Central Law Journal.

ST. LOUIS, MO., FEBRUARY 15, 1895.

The contention, quite common of late, between collectors of liquor licenses and social clubs, as to the liability of the latter to pay such license, has recently been considered by the Supreme Court of Missouri, in the case of State v. St. Louis Club, the opinion by Gantt, P. J., being an exhaustive and valuable review of the decisions upon the subject, the case being one of first impression in that court. The conclusion was that when a *bona fide* social club with limited membership, admissions to which cannot be obtained by persons at pleasure, and whose property is actually owned in common by its members, distributes liquors belonging to it among them, it is not a "sale" of liquor within the Missouri dramshop act.

The leading case which holds the dispensing of liquors by a club to its members is not a sale, under the revenue laws of England, is Graff v. Evans, 8 Q. B. Div. 373. The same result was reached by the Supreme Court of Massachusetts in Com. v. Pomphret, 137 Mass. 564. In Com. v. Ewing, 145 Mass. 121, by the same court a conviction was sustained where the proof showed that the club was not a *bona fide* organization. The Supreme Court of Maryland, in Seim v. State, 55 Md. 566, held the transaction not a "sale." So, also, the Supreme Court of Tennessee in Club v. Dwyer, 11 Lea, 452. In Piedmont Club v. Com., 87 Va. 541, the Supreme Court of Virginia held that the sale of liquor by the Piedmont Club was not such a sale as was contemplated by the statute. In State v. McMaster, 14 S. E. Rep. 290 the Supreme Court of South Carolina, in deciding that a social club is not liable to pay license, points out that much of the seeming conflict of the cases arises from two causes, First, where the alleged club, as a matter of fact, is not *bona fide* what it purports to be, but is a mere device to evade the law against retailing liquor without a license. In all such cases, of course, the club is liable. And, second, from the difference in the terms of the various acts upon the subject, each court construing for itself the laws and regulations of its own State. In Barden v. Club, 25 Pac. Rep. 1042, the Supreme Court of Montana reach the same conclusion as the cases above cited. The most recent case is Koenig v. State, 26 S. W. 835, in which Judge Hurt, for Court of Criminal Appeals, of Texas, reviews all the late cases, pro and con, and holds that the club room of a German Turnverein, maintained in connection with a hall for the usual purposes of such a society, and equipped with periodicals, billiard tables and card tables, for the free use of its members, where intoxicants are furnished, without profit, to members only for fees which are turned into the general fund, is not a house for retailing liquors within the Penal Code of Texas (article 355) which prohibits card playing in such places. He cites with approval the above cases from Virginia, Tennessee Montana, Maryland, Massachusetts and South Carolina, and the Queen's Bench in Graff v. Evans, and points out that in Chesapeake Club v. State, 63 Md. 446, the local option law was in force, and calls attention to the separate opinion of Judge Bryan, concurred in by Judges Yellott and Irving, reaffirming Seim v. State, *supra*.

Most of the cases which seem opposed to the doctrine announced by the Missouri court were distinguished. The decision in State v. Easton Social, Literary, etc., Club, 73 Md. 97, 20 Atl. Rep. 783, was a construction of the local option law. The two cases of State v. Lockyear, 95 N. C. 633, and State v. Neis, 108 N. C. 787, 13 S. E. 225, were likewise decided on prosecutions for violation of the local option law of that State; so, likewise, was People v. Andrews, 115 N. Y. 427, 22 N. E. 358. Rickart v. People, 79 Ill. 85, was a case where the club was held to be clearly a shift or device to evade the provisions of the law. In State v. Mercer, 32 Iowa, 405, the court says: "The scheme of organization was a rather clumsy device by which the members of the social club hoped to defeat the law." State v. Horacek, 41 Kan. 87, 21 Pac. 204, was clearly a device. State v. Bacon Club, 44 Mo. App. 86, is not in conflict, as it is very evident the club was organized to evade the law, and for no other purpose. In Kentucky and University Club

v. City of Louisville (Ky.), 17 S. W. 743, the prosecution was under a city ordinance which provided that "every club house and club room and other places of resort generally known as such, wherein spirituous liquors are sold at retail, shall pay a license." The intention to tax the club for pursuing a method such as respondent adopted in that case is too evident to need discussion; so, also, was State v. Boston Club (La.), 12 South. Rep. 895, requiring that club to be licensed. The cases of Newark v. Club, 53 N. J. Law, 99, 20 Atl. 769, and People v. Soule, 74 Mich. 250, 41 N. W. 908, are the strongest cases that hold that a transaction of this character is a violation of the retail liquor law of those States.

NOTES OF RECENT DECISIONS.

ACTION AGAINST EMPLOYER—ILLNESS OF EMPLOYEE—POISONED AIR IN WORK ROOM—EVIDENCE.—In Shea v. Glendale Elastic Fabrics Co., 38 N. E. Rep. 1123, decided by the Supreme Judicial Court of Massachusetts, which was an action by a servant against his master for personal injuries received from illness caused by the atmosphere of defendant's work room being impregnated with particles of lead, it was held that evidence that other persons working at the same place and under conditions similar to plaintiff were affected with lead poisoning is admissible to show that the room was impregnated with the poisonous matter. Knowlton, J., says in part:

The question in dispute was whether there was an impalpable poison in the atmosphere of the defendant's mill, which would be likely to have a certain effect upon the human body. The most natural way of obtaining the true answer to the question was by inquiring what effects, if any, had been produced upon persons accustomed to breathe this atmosphere. The conditions under which the different persons in the room were exposed were similar, and, so far as that factor in the problem is concerned, we should expect precisely the same effect. These persons had bodies similar in form and structure, with the same organs, governed by the same laws, and with like susceptibilities. Of course there were diversities in their previous experiences, and in their condition outside of the mill, and on that account the effects upon the different persons might differ slightly. But, so far as appears, the symptoms of their illness were so distinctive and peculiar as to point almost conclusively to the same cause. We are of opinion that this evidence tended to show that there was exposure in the defendant's mill which caused the same illness in them all. There was undoubtedly evidence in regard to the symptoms and nature of the plaintiff's illness which is not reported on the bill of exceptions, all of which, presumably, was considered by the presiding justice in determining whether the evidence should be admitted. In deciding questions of this kind much depends on the circumstances of each particular case, and much is therefore left to the discretion of the judge. To express this conclusion in another way: whenever the competency of evidence depends on the view to be taken of any doubtful question of fact which appears of record, or on facts and evidence not reported, this court will not attempt to revise the decisions of the trial judge. Com. v. Gray, 129 Mass. 474; Hunt v. Gas-light Co., 8 Allen, 169-171; Robinson v. Railroad Co., 7 Gray, 92-95. In Baxter v. Doe, 142 Mass. 558, 8 N. E. Rep. 415, which was an action for damages against the owner of a vessel for neglect to furnish proper food to a sailor, evidence that other members of the crew, exposed to similar conditions, were sick at about the same time, was held to be competent. Hunt v. Gas-light Co., 8 Allen, 169, 1 Allen, 343, was an action for negligently suffering gas to escape into a house occupied by the plaintiff, whereby he was made sick; and it was decided that the sickness of other persons in the same house, exposed to the same conditions, might be introduced by the plaintiff. Similar principles were involved in the judgments in Hodgkins v. Chappell, 128 Mass. 197; Brierly v. Davol Mills, 128 Mass. 291; and in Reeve v. Dennett, 145 Mass. 23, 11 N. E. Rep. 938. See, also, Crocker v. McGregor, 76 Me. 282; Boyce v. Railroad Co., 43 N. H. 627; Darling v. Westmoreland, 52 N. H. 401; Cleveland v. Railroad Co., 42 Vt. 449; House v. Metcalf, 27 Conn. 631; Field v. Railroad Co., 32 N. Y. 339; Railroad Co. v. Richardson, 91 U. S. 454; District of Columbia v. Armes, 107 U. S. 519-524, 2 N. E. Rep. 840; Brown v. Railway Co., 22 Q. B. Div. 391-393. The objection that such testimony is likely to lead into collateral inquiries in order to establish its force or to show its weakness is one that may be made to almost all circumstantial evidence, and which addresses itself to the sound discretion of the court. If it seems probable that a line of inquiry will lead into side issues not anticipated by the parties, and which will be likely to distract and confuse the jury, and unreasonably protract the trial, the questions should be excluded; but if, on proofs of identity or likeness of conditions, a fact will have important probative force, it should not be excluded if its relation to the case can easily be shown. It must be assumed in this case, in the absence of anything to show the contrary, that there was no great practical difficulty in presenting and considering the evidence which was objected to, and that the presiding justice found that the similarity of conditions was so clearly and so easily shown as to make the testimony proper.

ASSIGNMENT FOR BENEFIT OF CREDITORS—INSOLVENT CORPORATION—FRAUD—PREFERENCE.—The Supreme Court of Arkansas in the case of Worthen v. Griffin, 28 S. W. Rep. 286, decide the following points bearing on the question of power of insolvent corporation in giving of preferences:

1. Evidence that one of the directors of an insolvent mercantile corporation, an individual indorser on its paper, made heavy purchases for the company, on credit, two months before the assignment, after saying to one of the other directors that he intended to

buy very few goods, is not sufficient to show that he contemplated the assignment at the time he made the purchases, where it also appears that before making them he consulted with the head of one of his store departments as to what goods were needed in that department, told him to order only what were absolutely necessary, and then purchased only half of what were requested.

2. The fact that a few days before its assignment one of the directors of an insolvent corporation withdrew $700 in cash from its assets, and appropriated it to his own use, will not affect the validity of the assignment, if the latter does not in any way promote or cover up the acts of the director in reference to such withdrawal.

3 The fact that an insolvent corporation, at or about the time it executed an assignment preferring certain creditors, in due form, and otherwise legal, also confessed judgments in their favor, based on valid debts, does not affect the validity of either the assignment or judgments.

4. The intention of certain of its preferred creditors in whose favor it has also confessed judgments, to make an unwarranted application for a receiver of the property of a corporation which is about to make an assignment, followed by the unauthorized appointment of the assignee as receiver without opposition on the part of the corporation, is not such fraud as will invalidate the assignment.

5. The assets of an insolvent corporation, are a trust fund for the benefit of creditors only after a court of equity, at the instance of a proper party, has taken possession of them.

6. Where personal interests of certain of its directors are subserved through the preference of certain creditors in an assignment by an insolvent corporation, it is voidable merely, and then only at the instance of the corporation.

7. In the absence of statute, an insolvent corporation may, in an assignment for the benefit of creditors, prefer a debt due one unconnected with the corporation, and secured by notes upon which a majority of its directors are indorsers, where such debt is one for a *bona fide* loan to the corporation.

MASTER AND SERVANT—INJURIES TO DOMESTIC SERVANT — LIABILITY OF MASTER'S WIFE.—The question involved in the case of Steinhauser v. Spraul, 28 S. W. Rep. 620, decided by the Supreme Court of Missouri, is something novel. It was held that a wife living with her husband is not liable for injuries to a domestic servant who, at her request, went to a loft on the husband's premises, and was injured because the ladder to the loft was not suitable for the purpose. Sherwood, J., says in part:

> The whole case turns on the point whether, in giving such order, defendant was guilty of a mere omission of duty or negligence, while acting within the scope of her implied authority, derived from her husband, or whether she was guilty of an actionable misfeasance. In a very early case, Chief Justice Holt clearly drew the distinction between the non-liability of a person to a third party because of negligence or non-feasance and misfeasance, or positive wrong, saying: "It was objected at the bar that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it. So they might anybody else on whom they could fix that fact. But for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it. But for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by negligence to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose the action may be brought against the bailiff himself, for then he is a kind of wrong-doer or rescuer; and it will lie against any other that will rescue in like manner." Lane v. Cotton, 12 Mod. 488; Williams v. Ry. Co., 119 Mo. 316, 24 S. W. Rep. 782; Fugler v. Bothe, 117 Mo. 475, 22 S. W. Rep. 1113; Watson v. Coal Co., 52 Mo. App. 366.
>
> In commenting on the first case just cited, the rule is versely stated: "That an agent is personally liable to third parties for doing something which he ought not to have done, but not for doing something which he ought to have done. In the latter case, the agent is liable only to his employer." Ewell's Evans, Ag. 438; Story, Ag. (9th Ed.) §§ 308, 309. . . .
>
> It will be pertinent, in this connection, to briefly note the facts and rulings in some early cases which serve to illustrate what has been quoted from the text writers. Thus, in Bell v. Catesby, 1 Rolle, 78, Rolle Abr. p. 94, pl. 5, it was resolved that if an underbailiff of a liberty levy a debt by virtue of a warrant of *fieri facias*, and then conceal the writ, and make no certificate, an action on the case lies against him, for this reason, that he has done a personal tort. *Vide* 1 Vin. Abr. 573. In Marsh and Astrey's Case, 1 Leon, 146, an undersheriff was held liable for returning a tenant summoned when he was not, upon the ground that this was a positive act, and not a mere negligence. In Cameron v. Reynolds, Cowp. 403, it was held that an action did not lie against an undersheriff for refusing to execute a bill of sale to plaintiff under a *fieri facias*. And Lord Mansfield said: "It is an action for a breach of duty in the office of sheriff. Whenever that is the case, the action must be against the high sheriff; and, if it proceed from the default of the undersheriff or bailiff, that is a matter between them and the high sheriff." These cases all go to point out the essential difference which exists between "acts of direct and positive wrong," which are misfeasances, and render the agent personally liable, and "mere neglects," or non-feasances, in which the liability is cast alone on the principal or master. This distinction finds illustration in Harriman v. Stowe, 57 Mo. 93, where the defendant, acting as the agent of his wife, and being a carpenter, built a trap door, and did the work so negligently that a third person fell through the hatchway which the door covered, and was injured; and it was held that the party injured was entitled to recover of the agent on the ground that the act which caused the injury, viz.: defectively constructing the trap door, was a misfeasance, as contradistinguished from a mere non-feasance or ommission of duty. And this was thus ruled after extensive and approving citations and quotations from Story and other authorities heretofore cited.
>
> In Horner v. Lawrence, 37 N. J. Law, 46, this case arose: Forsyth, owning a strip of woodland through which a railroad ran, procured the wood to be cut,

and employed Horner to haul it. Horner, in order to reach said woodland, obtained permission from Lamb, the owner of an adjoining field, where the hogs of Lawrence were being pastured, to pass through the field, and to open a gap in the fence at a certain place, with directions to close it up after he went in and after he came out, as the hogs and cattle in the field might get through on the railroad and get killed; and Horner passed through with his teams, leaving the gap open while the wagons were being loaded, but closing it when he went out. The hogs escaped through the gap, and one was killed and the other injured on the railroad. Held, that the leaving down the bars by Horner was not a mere neglect, but an intentional and willful violation of his authority, and a misfeasance, for which, as a servant or agent of Forsyth, he cannot claim exemption against the party injured. In Mississippi a very marked illustration of the point in hand has occurred, where it was ruled that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open; and that the only liability incurred by the agent was to his principal. Feltus v. Swan, 62 Miss. 415.

As heretofore seen from the authorities cited, they generally announce the doctrine that, in order to charge the agent with liability, such liability must spring from, and have its origin in, an act of direct and positive wrong done by the agent to the injured party. This idea is happily expressed in Delaney v. Rochereau, 34 La. Ann. 1123, where Burmendez, C. J., says: "The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong-doing—therefore in an act,—directly injures a stranger, then such stranger can recover from the agent damages for the injury. Story, Ag. 308, 309; Story, Bailm. 165; Shear. & R. Neg. (Ed. 1874) 111, 112; Evans, Ag. (notes by Ewell) 437, 438; Whart. Neg. 535, 78, 83, 780." "By Anglo-American law, a servant who by negligence in the discharge of his duties, injures a third person, is not personally liable to such third person. The maxim *respondeat superior* prevails, the principal is liable for the injury, and the agent is then liable to the principal for damages which the latter may have sustained." Whart. Ag. § 535. Now, in this case, nothing can be clearer than that defendant was acting within the orbit of her duty to her husband when giving the order alleged in the petition. This is the theory of the petition, which claims that the command was negligently given, owing to the fact that the ladder furnished for climbing into the loft, by reason of its length, could not be used for that purpose with safety. So that it readily appears that defendant, in giving the order, was not guilty of an act of direct and positive wrong to plaintiff, but simply of giving an order in her husband's business which, solely owing to the length of the ladder furnished by her husband for the purpose, and she having no other, was a negligent order. But it must be remembered that it was no part of defendant's duty to furnish a ladder of proper length, nor does it appear she had the wherewithal to do so. If it was not her duty, then she cannot be charged with even so much as negligence in failing to provide a ladder of requisite length; for negligence is simply duty violated or unperformed. The mere giving of the order, then, to get the pigeons, was not negligent order. It was her husband's duty to furnish a ladder of proper length, and it is the rule that a servant is never liable for the negligence of his master, nor can an action be maintained against a servant unless he can be considered as a wrong-doer. A servant is never liable to a third person merely for not doing that which it was the duty of the master to do. Hill v. Caverly, 7 N. H. 215. Thus, where a master, having an unsafe and insufficient dam across a stream of water, ordered his servant to shut the gate, and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away and an injury was done to a third person, it was held that the servant was not liable. See, also, Bish. Non-Cont. Law, §§ 695, 628, 446.

With respect to the use of the word "misfeasance" by Lord Holt in the passage already copied, the learned author heretofore quoted says: "For negligence, Lord Holt tells us, the servant is not liable; for misfeasances he is liable. If we are to understand by 'Negligence,' in Lord Holt's sense, those imperfections in the discharge of duty which are incident to the labor of all men when under the control of others, and if we are to regard as misfeasances those torts which are committed by the servant out of the line of his employment, when acting on his own responsibility, then we can reconcile the famous passage just quoted, not only with the principles here advocated, but with the analogies of the law in other relatives" Whart Ag. § 536. This view accords with the views of Story and others as to the distinction between "mere neglect" and misfeasances or positive wrongs, and conclusively shows that defendant, not having crossed the boundaries of her implied employment, was in nothing *derelict*, and in nothing liable so far as concerns plaintiff. There are cases, indeed, where an order, when given by an agent, results in direct injury to a third person, and the agent there will be held liable to the person injured. Thus in Bell v. Josselyn, 3 Gray, 309, it was ruled that "an agent who negligently directed water to be admitted to the water pipe in a room of his principal's house, over which he had general management, thereby flooding a tenement below, was personally liable." There it was held that it was an act of mere non-feasance on the part of the defendant to fail to examine the condition of the pipes before causing the water to be let on, but that the turning on of the water without such precedent examination was a misfeasance, and none the less so because preceded by a nonfeasance, and so the action of tort against the defendant was maintained. In that case, however, the agent was acting in an independent sphere of action,—"pursued his own way,"—and consequently occupied a different and higher plan of liability than the defendant wife in the case at bar, owing to her subordinate position in the household, and the matrimonal relations she sustained; because when the agent, by the negligent performance of his ordinary duties, injured a third person, only the principal is liable if the agent's individualty is absorbed in that of the principal; for wherever there is liberty there is liability, and *vice versa*. Whart. Ag. §§ 537, 538. This further difference between the case instanced and the present one consists in the fact that the order in that case was as much a direct and positively wrong as though the fingers of the agent had turned the water on instead of his tongue.

There are cases, too, of omission which may result in liability, and this illustration is given in the Digest in the discussion of the Aquillian law: "One servant lights a fire and leaves the care of it to another. The latter omits to check the fire, so that it spreads, and burns down a villa. Is there any one liable for the damages?

The first servant is chargeable with no negligence, and the second chargeable only with an omission. Of course, if we apply to this case the maxim that a mere omission cannot be the basis of a suit, there can be no redress." In such case the eminent author from whom quotations have already been made, says: "It is clear that in the case before us the non-action of the second servant is equivalent to action. He undertakes the charge of the fire, and in the imperfect performance of this charge he acts aggressively and positively. So, also, is it in the well-known case of a physician who undertakes the care of a patient." Whart. Neg. § 80. Of course, no such "aggressive and positive" omission can be laid at the door of the defendant, and consequently no such liability as springs from an omission of that sort.

There are cases where a servant is liable to his fellow-servant for negligence resulting in injuries to the latter; but it is believed it will be found upon examination that no such liability attaches except where some physical act is done by the servant, and results to the damage of his fellow, or where the servant occupies an independent plane, and his orders to his fellow-servants are equivalent in force, effect, and resultant injury to a physical act, as in Bell v. Josselyn, *supra*. Where the servant acts as the master's representative, "without liberty," he is not responsible for injuries to his fellow-servant resulting from his negligence, unless those injuries are either directly or in effect positive physical wrongs, for which he would be legally liable were he acting without instead of with orders. Whart. Neg. (2d Ed.) §§ 245, 246; Whart. Ag. § 535. The case of Osborn v. Morgan, 137 Mass. 1, affords apt illustration of the principle which renders liable an agent who, acting in an unfettered way, has the general conduct and control of affairs, and gives an order which necessarily and immediately results in injury to an inferior fellow-servant. There, the order given by the general superintendent should not have been given, because, as said by Devens, J., "A single careful glance would have shown the hazardous condition in which the machinery was to be left, · · · and which the execution of the order made dangerous." There, the order was the equivalent of a direct and physical wrong, as much so as though the hands of the general superintendent had removed the closet, instead of the hands of his subordinates. In that case, too, an instruction was approved that "the plaintiff must show in regard to the defendant he would hold, that that defendant had a duty in regard to the use of the apparatus, in keeping it in repair, and in condition to use, put upon him by the corporation." Rogers v. Overton, 87 Ind. 410, is another instance where an inferior fellow-servant suffered injury as the direct result of an order of his superior fellow-servant, for which the latter was held liable.

There are cases, also, where husband and wife, either one or both, as the circumstances happened, have been held liable for their joint or several torts. Many of these cases have been exhaustively cited and reviewed by Burgess, J., in Flesh v. Lindsay, 115 Mo. 1, 21 S. W. Rep. 907. But in none of those cases, and in none which a careful research has been able to discover, has a single instance been found where a wife, in giving her orders in and about her household affairs to one of her domestics, has been held liable for injuries resulting to such servant. And the fact that no such precedent can be found is cogent evidence that such a rule of law does not exist. Venable v. Railway Co. (Mo. Sup.) 20 S. W. Rep. 493, and cases cited. And certainly the non-liability of the defendant wife ought to be the dominant principle in surroundings such as this record presents. Here defendant was environed by the confines of a narrow and limited authority. She was "subdued to the very quality of her lord." She was the mouthpiece of her husband, as much so as if she had said, "Anna my husband says go up and get down the pigeons," in which case it would hardly be contended that defendant could have been held liable to an action. The premises considered, it seems to me that the circumstances in evidence, as disclosed by the record, show no liability on the part of defendant, when considered as acting as the implied agent of her husband.

COUNTIES — NEGLIGENCE — DEFECTIVE BRIDGE — OBSTRUCTION IN ROAD.—The Supreme Court of Appeals of West Virginia say, in Rohrbough v. Barber County Court, 20 S. E. Rep. 565, that where an injury is the combined result of a horse becoming suddenly frightened, and shying away from a pile of rock beside the roadway, and the failure of the county court to provide a suitable guard rail along the approach to a bridge, the county is liable for the damages sustained by reason thereof. The following is from the opinion:

The only question presented is the liability of the defendant for the damages sustained by the plaintiff. In the case of Smith v. County Court, 33 W. Va. 713, 11 S. E. Rep. 1, this court held that the county was not liable for injuries sustained by reason of a horse frightened at two calves, backing a buggy over the side of a narrow road, as the accident was not occasioned by a failure to keep the road in proper repair, but by the unmanagableness of the horse, caused by the sudden appearance of the calves and the unskillfulness of the driver. The Supreme Court of Massachusetts, in the case of Titus v. Northbridge, 97 Mass. 266, says: "When a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes on a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appear that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." And in the case of Palmer v. Andover, 2 Cush. 608: "It is the ordinary course of events, and consistent with a reasonable degree of prudence on the part of the traveler, that accidents will occur; horses may be frightened; the harness may break; a bolt or screw may be dropped. To guard against such accidents, the law requires suitable railings and barriers, a proper width, to the road, and whatever may be reasonably required for the safety of the traveler." The law is also stated as follows, to-wit: "Where the injury is the combined result of an accident and a defect in the highway, and would not have happened but for the defect, the town is liable." Palmer v. Andover, *ut supra*; Kelsey v. Glover, 15 Vt. 708; Davis v. Dudley, 4 Allen, 557. From these authorities the proposition is deduced that if sufficient time elapses between the fright of the horse and the accident to permit the

driver, being a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the county would not be liable for its negligence, as the injury must be attributed to the viciousness of the horse, rather than to the defect in the highway. But if no such time intervenes, but the fright and accident are concurrent events, then the county would be liable, for the very purpose of the law requiring dangerous approaches to bridges to be protected by a sufficient railing is to guard against just such accidents, rendered unavoidable by reason of their suddenness. In this case it is not made to appear whether any time intervened between the fright of the horse and the accident, but it appears to be conceded that they were both almost instantaneous occurrences. Before he was able to make any effort to control the horse, the driver, buggy, and horse had gone over the wall of the approach to the bridge. Neither want of due care, under the circumstances, can be imputed to the driver, nor viciousness to the horse. It is true that the accident would not have occurred if the horse had not become frightened; neither would the fright of the horse have occasioned the accident if the legal guard rail had been there, to have prevented it. The plaintiff was not guilty of contributory negligence in attempting to cross the bridge after night. It was open for travel, and he had the right to presume, in the absence of knowledge to the contrary, that the county had discharged its duty, and made it safe for travelers, even on a dark night. The best of horses will become suddenly frightened, and no human foresight can foresee and guard entirely against such fright; but dangerous bridge approaches can and should be protected by suitable railings. From the certificate of facts as ascertained by the judge of the Circuit Court, who visited and viewed the place of the accident, we are unable to say that his conclusion and judgment are wrong, in the light of the foregoing decisions; and therefore the judgment is affirmed.

CRIMINAL LAW—FORGERY—VARIANCE.—In State v. Collins, before the Supreme Court of North Carolina which was a criminal prosecution for forgery where the indictment charged that the name forged was "Major Vass," evidence that the signature was "Major Vase" was held no variance. In the following opinion of the court by Clark, J., will be found interesting examples of immaterial variances:

As to whether Maj. Vase and Major Vass are *idem sonans* and immaterial variance we find numerous cases where a greater difference was held immaterial. In this State: Runkins for Rankin, and Dulks & Helker for Helker & Duts, *ut supra;* also Willis Fain for Willie Fanes (State v. Hare, 95 N. C. 682); Deadema for Diadema (State v. Patterson, 24 N. C. 346); Michaels for Michal (State v. Houser, 44 N. C. 410); Anny v. Anne (State v. Upton, 12 N. C. 513); Hawood for Haywood (State v. Covington, 94 N. C. 913); Susan for Susannah (State v. Johnson, 67 N. C. 55). In other States among many names held *idem sonans*, and not a variance, the following can be cited at random: Allesandro for Alexander (Alexander v. Com., 105 Pa. St. 1); Anthron for Antrum (State v. Scurry, 3 Rich. Law, 68); Bobb for Bubb (Myer v. Fegaly, 39 Pa. St. 429); Brearly v. Brailey (People v. Gosch [Mich.] 46 N. W. Rep. 101); Bert Samrud for Bern't Sannerud (State v. Sannerud, 38 Minn. 229, 36 N. W. Rep. 447); Barnabus for Barney (McGregor v. Balch, 17 Vt. 562); Beckwith for Beckworth (Stewart v. State, 4 Blackf. 171); Burdet for Boudet (Aaron v. State, 37 Ala. 106); Cuffee for Cuff (State v. Farr, 12 Rich. Law, 24); Conn for Corn (Moore v. Anderson, 8 Ind. 18); Colburn for Coburn (Colburn v. Bancroft, 23 Pick. 57); Doerges for Dierkes (Gorman v. Dierkes, 37 Mo. 576); Dillahinty for Dillaunty (Dillahunty v. Davis [Tex. Sup.] 12 S. W. Rep. 55); Elliott for Ellett (Robertson v. Winchester, 85 Tenn. 171, 1 S. W. Rep. 781); Fauntleroy for Fontleroy (Wilks v. State, 27 Tex. App. 381, 11 S. W. Rep. 415); Tebruary for February (Witten v. State, 4 Tex. App. 70; Fayelville for Fayetteville (U. S. v. Hinman, Baldw. 292, Fed. Cas. No. 15,370); Foster for Faster (Foster v. State, 1 Tex. App. 533); George Rooks for Geo. W. Rux (Rooks v. State, 85 Ala. 79, 3 South. Rep. 720); Giddings for Gidines (State v. Lincoln, 17 Wis. 597); Girous for Geroux (Girous v. State, 29 Ind. 93); Heremon for Harriman (State v. Bean, 19 Vt. 530); Haverly for Havely (State v. Havely, 21 Mo. 498); J. D. Hubba for Joel D. Hubbard (Gumm v. Hubbard, 97 Mo. 311, 11 S. W. Rep. 61); Isah for Isiah (Ellis' Adm.'r v. Merriman, 5 B. Mon. 297); Jeffreds for Jervais (Com. v. Brigham, 147 Mass. 414, 18 N. E. Rep. 167); Kay for Key (Dickinson v. Bowers, 16 East, 112); Kealiher and Keolhier for Kelhier (Millett v. Blake, 81 Me. 531, 18 Atl. Rep. 293); Kreily and Kreitz for Critz (Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. Rep. 232); Lebering for Lebrum (Ketland v. Lebering, 2 Wash. C. C. 201, Fed. Cas. No. 7,744); Lawson for Lossene (State v. Pullens, 81 Mo. 387); Leaphardt for Leaphat (Leaphardt v. Sloan, 5 Blackf. 278); T. C. Lucky for C. C. Lucky (Brown v. State, 32 Tex. 124); Mary Etta for Marietta (Goode v. State, 2 Tex. App. 520); Minner for Miner (Jackson v. Bonehan, 15 Johns. 226); McLaughlin for McGlof'lin (McLaughlin v. State, 52 Ind. 476); Marres for Mars (Com. v. Stone, 103 Mass. 421); Mousuer for Mosuser (Ruddell v. Mozer, 1 Ark. 503); Nuton for Newton (Newton v. Newell. 26 Minn. 529, 6 N. W. Rep. 346; Pilip for Philip (Taylor v. Rogers, 1 Minor [Ala.] 197); Petterson for Patterson (Jackson v. Cody, 9 Cow. 140); Petrie for Petris, almost this very sound, "e" for "s" (Petrie v. Woodworth, 3 Caines, 219); Preyer for Prior (Page v. State, 61 Ala. 16); Rae for Wray (3 U. C. Law J. 69); Shafer for Shaffer, also similar to the sound here (Rowe v. Palmer, 29 Kan. 337); Shields for Sheals (3 Luz. Leg. Obs. 174); Stafford for Stratford (Wilson v. Stafford, 2 Chit. 355); Sunderland for Sandland (Sandland v. Adams, 2 How. Pr. 98); St. Clair for Sinclair (Rivard v. Gardner, 39 Ill. 129); Storrs for Stores (People v. Southerland, 81 N. Y. 1); Sofira for Sofia (Owen v. State, 7 Tex. App. 329); Tinmarsh for Tidmarsh (Homan v. Tinmarsh, 11 Moore, 231); Usrey for Usry (Gresham v. Walker, 10 Ala. 370); Whyneard for Winyard (Rex v. Foster, Russ. & R. 412); Zemeriah for Zimri (Ames v. Snider, 55 Ill. 490). In Gooden v. State, 55 Ala. 178, the name attempted to be forged was Thweatt. The forgery had it Threet. The conviction was sustained.

THE DOCTRINE OF ESTOPPEL AS APPLIED TO SPECIAL TAX BILLS.

It is customary to term the doctrine of estoppel a harsh doctrine, but it was well established as early as in the days of the Romans. To prevent the telling of the truth, or to deny

one the benefits of a valid defense, seems at war with the most fundamental notions of justice. It should never be employed unless it be absolutely essential to the maintaining of equity and fair play. But "nobody ought to be estopped from averring the truth, or asserting a just demand, unless by his acts or words, or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who had been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do."[1] But, unfortunately, the courts rarely decide with precision the exact character of the inducement above named. If one party be ignorant of certain facts, and he is knowingly or negligently made so, kept so, or left so, by the acts, words or silence of the other party, the element of unfairness and deception is so strong that the doctrine of estoppel should certainly apply. But if the ignorance or knowledge of both parties are equal, it is more difficult to detect why a valid, legal defense should be forfeited.

To illustrate: if the common council has no power to pass the ordinance under which certain street improvements are made, or if substantial irregularities, constituting perfect legal defenses, attend the steps taken by the council and officials in connection with said work, or if the contractor departs, essentially, from the commands of his contract, and the contractor is as thoroughly informed of the law and the facts as the property owner, and is not in any way misled by affirmative acts of the property owner, it is not clear that so harsh a doctrine as estoppel can be justly pleaded. To silently receive benefits which have been lawlessly conferred by one conscious of his errors has not, outside of the field of so-called public improvements, invoked the application of this doctrine. Yet why should the principle of estoppel be broadened here, since the "silent" man who is forced to pay for public improvements is not being benefited in as purely a personal sense as in other cases?

In Steel v. Smelting Co.,[2] Justice Field said: "But this salutary principle (of estoppel) cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none." The learned jurist further says of this doctrine: "It is often applied where one owning an estate stands by and sees another erect improvements on it, in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is, in such conduct, a manifest intention to deceive, or such gross negligence as amounts to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements." In Olden v. Hendrick,[3] Black, J., said: "The chief objection to the application of any principle of estoppel is, that the sheriff's deed to Williams was made matter of record in 1850, so that the public records disclosed his title, and hence he was not bound to take any active measures to prevent persons from purchasing from his father." In both of these cases money was being lavishly expended to the knowledge of the "silent" man, and expended by parties who only had constructive knowledge of the facts and law of the case, and in the first instance the "silent" man was being distinctly benefited by the folly of the other party, yet the doctrine of estoppel did not apply. Yet certain cases seem to hold that the "silent" property owner, if he only knows as much of the affair as the contractor, must pay for street improvements, although his benefits may be quite remote and fanciful, and although the contractor may cunningly father the faulty legislation, and make the history of irregularities that, if estoppel could not be pleaded, would invalidate the tax bills. Indeed, in certain of these cases, the property owner was not as much within touch of the tree of knowledge as the contractor, and whilst the work was progressing must have been ignorant of the lawlessness of the procedure, and, consequently, did not have actual knowledge of grounds for protesting against the work.

The case of Kellogg v. Ely,[4] appears to take this extreme position in favor of the contractor, although the exact facts and points above discussed are not clearly involved in

[1] Herman on Estoppel, vol. 1, § 7.
[2] 106 W. S. 456.
[3] 100 Mo. 538.
[4] 15 Ohio St. 64.

that case. The court contents itself with a graphic picture of the plaintiff's wickedness. It says: "Again, when the different sections of this ditch were let to the lowest bidder, and when the first spade had been thrust into the earth in the execution of the contracts then made, before the contractors had expended any money, or the laborers any sweat, then, if ever, the remedy by injunction was open to the plaintiff below. But then he did not invoke it. It does not appear from the record that he ever warned the contractor or laborers that he intended for himself to resist the collection of the assessment which must follow to raise the money to pay them, but remaining inactive and silent until his swamp lands were drained by a ditch nearly a mile in length, he then, for the first time, asks the interference of a court of equity. We think he comes too late."

The only point herein made clear, is that the plaintiff was enriched to the extent of one mile of ditches and gainsayed it not; consequently, equity cannot aid him. But in the Steel case (*supra*) the facts did not substantially differ, save that equity was not invoked. I assume that in both of these cases each party treated the other at arm's length, and that in the Ohio case the contractor was not made or kept ignorant of a single fact, or the law applicable thereto, by the property owner. But in another portion of this opinion, the Ohio case was placed on safer grounds. By the statutes of that State, certain proceedings touching such work must first be had in the probate court and before the county commissioners, and the property owner was afforded the right of appeal therefrom; the complaints herein made were to certain irregularities of the commissioners, and not of the contractor; consequently, it might have been ruled that the doctrine of *res adjudicata*, rather than of estoppel, applied. If this was true, however, the contractor and laborers could not have been stopped just as they begun to "work and sweat." But inasmuch as the court so strongly emphasizes the silence of the property owner at that particular point, the opinion is relied upon in other cases to uphold the broadest claims of contractors. It is urged in cases where there are no preliminary court proceedings; it is supposed to defeat the "silent" property owner where the common council lacks power to pass the ordinance, or the ordinance is unreasonable, and therefore void, or the contractor has willfully or recklessly departed from the commands of his contract. Indeed, this case is used to establish that the property owner is estopped when he even had, at the time the work was done, no knowledge save of a constructive nature, that there were any defenses or wrongs to speak about. Lawyers have rested on this case to assert, that if without protest the ditch was dug, let the farmer pay for it. All of this follows from the Ohio court appearing to so extremely regret that the farmer should get something for nothing. But if the silent receipt of alleged benefits settles, in equity at least, every controversy of this kind, then the contractor who actively and knowingly seeks to unlawfully impose a lien on his neighbor's land should never lose his "work and sweat."

It seems difficult to determine why, in either courts of law or equity, the doctrine of estoppel should ever be applied as against the "silent" property owner, when the knowledge of both parties are exactly equal. We have seen that in the Steel case (*supra*) the highest court in America did not hesitate to permit the "silent" property owner to keep benefits placed there by a foolish party, who did not seem to know, but ought to have known, that he had no title to the land. In Childs v. K. C. Railroad Co.,[5] the court said: "In this State the duty of instituting proceedings to condemn is devolved upon the railroad company, and the company must obtain the assent of the property owner to enter and construct its road, or procure the right to do so by condemning the property, otherwise it will be a wrong-doer, and the property owner has the same remedies that he would have against any other wrong-doer. The mere fact that he saw the road built upon his land and did not object, will be no protection to the company, unless such want of objection and other circumstances justify the inference of consent on his part. Speaking of some of the decided cases, Mr. Lewis says: 'So far as regards mere acquiescence as an estoppel, it seems to us the cases are not well founded. There is no law which compels a man to protest against a wrongful entry upon his land at the peril of being held

[5] 23 S. W. Rep. 378 (S. C. 116 Mo. at page 432).

to ratify it. Both parties know their rights. The law provides a mode in which the party seeking to obtain property for public use may do so lawfully. If such party disregards the mode prescribed, and enters upon property without consent, it is a wrong-doer, and can acquire no rights by expending money on the property. Nor does the owner lose any rights by mere delay.' ''

It must be fully considered that the relationships in many cases are of a contractual nature, and the doctrine of estoppel should be applied, even though the knowledge of all the facts is more completely with the party who pleads estoppel than with his opponent. For example, if a defendant makes a contract with the plaintiff, under the plaintiff's corporate name, he is estopped from denying the incorporation of the plaintiff, although it is clear that the defendant did not thereby deceive the plaintiff into believing that it was properly incorporated.[6] Yet even where such relationships exist, Judge Nelson, in Welland Canal Co. v. Hathaway,[7] denied that estoppel could be pleaded. "If they (plaintiffs) have not the powers and privileges assumed on their part in their dealings with them, it is their own fault, not his. Whether they had these powers must have been known to themselves, not to the defendant, and no act of his could legally add to or detract from them." The learned judge quotes the leading case of Henrique v. The Dutch Co. (*supra*), as "rather favoring" his position, and Ld. Ch. J. King who, when at the bar, tried that case, told the reporter of it, that he made the plaintiffs prove their incorporation. Yet Judge Wagner in Nat. Ins. Co. v. Bowman (*supra*), thought a demurrer "frivolous and devoid of merit," which denied, under like circumstances, an estoppel. Neither can a tenant deny his landlord's title, nor a bailee his bailor's.

It can be admitted that Judge Nelson was wrong, that a man should be estopped from denying whatever his contract implies, and that affirmative action on the part of the property owner justly prevents him from contradicting whatever those affirmative acts recognized as existing. In the Matter of Sharp,[8] the petitioner requested in writing the proper officials to repave the street in front of his property. Nicholson pavement was laid, and Sharp sought to vacate the assessment, because the majority of property owners had not joined him in petitioning for it. He succeeded; the court holding that he had not represented to the commissioners either that the required majority had signed, or that he would waive the legal requirements of the case. The commissioners, without the proper petition behind them, were without power to act, and "a party," the court said, "is estopped only when, by his declarations or conduct, he has induced another to act upon the supposed existence of a fact, and would be in consequence injured by showing its non-existence." This rule is simple and plain. The contractor cannot plead estoppel unless the property owner has induced him to believe that the unreal is the real, unless the ultra position is taken, that the silence of the property owner is a promise to pay for the work. But, 1st, no case seems to assert squarely this proposition; and, 2d, if it was true, one must pay for silently accepted improvements constructed without any ordinance or law having been applied for or enacted. The Sharp case is a strong one against the too general and illogical use of the principle of estoppel, since here, 1st, the complainant asked for the pavement; 2d, knowingly got it, and, 3d, was aided to escape payment by a court of equity.

In Tone v. Columbus,[9] the court properly distinguished such a case as Sharp's from many of the cases which hold the property owner bound by every concession that is substantially included in his affirmative acts. If the petition is addressed to the common council by the owners of abutting property, they are estopped from denying that the common council, when properly petitioned, has power to pave the streets. Manifestly the two positions are absolutely inconsistent. This, indeed, was as far as Judge Cooley need have gone in Matz v. Detroit,[10] which case sometimes is cited to establish that whatever law courts might do equity will compel

[6] The Duchess Cotton Manufactory v. Davis, 14 Johns. 238; Henriques v. The Dutch Co., 2 Ld. Raym. 1535; Worcester Inst. v. Harding, 11 Cush. 285; Jones v. Type Co., 14 Ind. 89; Congregational Society v. Perry, 6 N. H. 164; Nat. Ins. Co. v. Bowman, 60 Mo. 252; Sharp Co. v. Holland, 14 Fla. 384; Jones v. Bank of Tenn., 8 B. Mon. 123; Herman on Estoppel, § 1254; Bliss on Code Pleading (1 Ed.), § 253.

[7] 8 Wend. 484.

[8] 56 N. Y. 257.

[9] 39 Ohio St. 268, 48 Am. Rep. 438.

[10] 18 Mich. 526.

the property owner, who has petitioned a council to make improvements, to stand by whatever the council does. In City of Burlington v. Gilbert,[11] the petitioners in person presented the request to the council, and the court further found that the plaintiff, who was one of these petitioners, knew that the signers were not sufficient, and consequently it might seem that the plaintiff, by carrying the petition to the council, represented that enough had signed, since, otherwise, it ought not to have been taken there. This argument is a little strained, and the Sharp case criticises it, but yet the property owner should never be permitted to question what his affirmative acts imply; the same principle governs as binds the tenant to always acknowledge that the man who has let him into a house has a good title to it.

But when certain courts seem to invite us to go one step further, and assert that in strictly *in invitum* proceedings, where the parties have no connection with one another save through their common descent from Adam, that the property owner is bound to pay for alleged improvements that the contractor knew, actually or constructively, he had no right to make, we hesitate. If Judge Nelson refused to admit estoppel into the Hathaway case, even when the defendant had solemnly covenanted in writing to recognize the plaintiff as incorporated, on the theory that the plaintiff knew he was not incorporated, how shall the contractor complain of the property owner, because he was not warned that his illegal acts would not be generously rewarded in tax bills? Admit that Judge Nelson went too far; but why too far? because in the Hathaway case contractual relationships existed, and Judge Bliss speaks of this case as illustrating an "estoppel by contract."[12] Every case and text writer would seemingly uphold Judge Nelson's decision if there had been no contract in that case; now there is none between the property owner and contractor; why then gainsay, in such circumstances, Judge Nelson's words? Why hesitate to call it the contractor's "fault," and to argue that if the truth be "known" to him, estoppel does not apply. Concede that in the Hathaway case the defendant did not know of plaintiff's incapacity to contract, it is evident that if he had the decision would have been the same, as the defendant could not have been charged with inducing the plaintiff to believe what it always knew was not so.

I have aimed to present this subject in accordance with all those underlying principles which control our most cherished views of the doctrine of estoppel, since I wish to reach cases in equity, as well as at law. Why should, in these days of common sense and code pleading, there be any distinctions which enables one sitting as a judge to defeat a tax bill, and forbid him, as a chancellor, from enjoining its issue? In Barnard v. German Seminary,[13] Judge Cooley says that estoppels *in pais* "are called equitable, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. Courts of equity recognize them in cases of equitable cognizance, but the courts of common law just as readily and freely; and it is never necessary to go into equity for the mere purpose of obtaining the benefit of an equitable estoppel, when the case is not otherwise of equitable jurisdiction." Yet the same learned jurist, in Martz v. Detroit (*supra*), says: "Whether, therefore, the assessment be legally valid or not, there is not the least ground on their part for claiming the interposition of a court of equity, by its extraordinary power of injunction to stay the collection of the assessment. Their remedy, if any, is strictly legal." It might seem that in most cases the ground for the injunction is fear that a cloud is about to be cast upon one's title, and then, if it be true, that estoppel broadens out no further in courts of equity than of law, the property owner's position should be as strong in one court as in the other.

Mr. Bigelow[14] asserts that Justice Cooley in the Barnard case (*supra*), stated "the general American doctrine, but in a few of our States the courts seem inclined to give these estoppels a somewhat wider effect in equity than at law," and cites early decisions in Indiana, Illinois and Ohio. It would seem that if one need not be driven from law into equity to get the benefit of equitable estoppels, he should not be driven from equity

[11] 31 Iowa, 356, 7 Am. Rep. 143.
[12] Bliss on Code Pl. (1 ed.) § 255.
[13] 49 Mich. 444.
[14] Bigelow on Estoppel, § 281.

into law to get rid of them. But if certain views herein expressed cannot be reconciled with some of the cases, it would seem that we can safely believe the Ohio court is not unduly partial to the rights of the property owner; yet that court in Wright v. Thomas[15] enjoined the county treasurer from collecting an illegal tax, levied to pay for a levee built under an unconstitutional law, though it was found that the property owner "had notice of the commencement and progress of the work; that he did not assent or object thereto, and that he took no measures to enjoin it till after its completion." Yet the court of common pleas, district court and supreme court hesitated not to enjoin the tax. The court distinguishes this case from that of Kellogg v. Ely (*supra*), on the theory that the levee was not on plaintiff's land, and the ditch was. The same court makes the same point in City of Columbus v. Alger,[16] saying: "Neither the city in causing the work to be done, nor the contractor in doing it, were trespassing as to her, although the proceedings were invalid. The title to the street was in the city and not in her. Its improvement was no injury to her, and she could not prevent it by any proceeding she could adopt, as she might have done had it been an improvement upon her own land. She was not called on to do anything until steps were taken to make the assessment upon her property. This distinguishes the case from Kellogg v. Ely." It is true that in the Alger case actual benefits were assessed in the lower court against the appellee, but she did not appeal or contest that point, at least, in the upper court, and it approved of Wright v. Thomas (*supra*). So even in Ohio, which produced the Kellogg decision, equity will not send to a court of law the "silent" property owner, who wishes an illegal and void tax to be enjoined.

The study of the cases discloses that most various positions are taken in controversies of this type; and when a court once takes its position it rests thereupon with emphasis. In the Kellogg case nothing was said about the significance of the fact that the work was done on the plaintiff's land, but only that benefits were silently received; for that reason alone the estoppel was upheld. In the Steel case (*supra*) the improvements on the defendant's land were never paid for, though silently received and no estoppel applied. In the Wright case (*supra*) and Alger case (*supra*), estoppel was held inapplicable, although benefits were received, and the reason for distinguishing them from the Ely case was because the improvements were not on the land of the property owner, but near it. In Schumm v. Seymore,[17] where the question of power to improve was specially considered, it was held that if it had not existed for want of legal notice to the property owner, that the guttering and paving were required to be done; that a sale of one's land to pay for the same could be enjoined. "The city did the work, and the complainant looked on, but no equitable estoppel arose from his inaction or silence, notwithstanding the special benefit received." No righteous indignation against the silence of the property owner was expressed as in the Kellogg case, although that work was done under a procedure that might have raised the questions of power and jurisdiction, if the court had not been so well satisfied to rest upon the doctrine of estoppel, because of benefits silently received.

Undoubtedly the best considered cases hold with the New Jersey courts, that the doctrine of equitable estoppel cannot be applied against a property owner who silently receives benefits from a city or contractor acting without jurisdiction or power in the first instance. Yet in many cases of this kind the contractor might have, as far as questions of estoppel were concerned, as great cause to complain of the disingenuousness of the property owner, as where that party silently receives benefits from a contractor who has grossly disregarded his own contract, or recklessly worked under ordinances substantially illegal. If we could hold firm to the cardinal idea included in the word estoppel, we should find fewer difficulties. There should be no legal inference that mere silence induces a man to believe he is acting along right lines, when he knows, or ought to know, that he is acting along wrong ones; and we should decide in equity as in law, that "if, in any material respect, the ordinances of the city bearing upon the question involved, had been disregarded by the city

[15] 26 Ohio St. 346.
[16] 5 West Rep. 783 (1886).
[17] 24 N. J. Eq. 155.

authorities or the plaintiff, his suit on his tax bill could not be maintained."[18]

JOHN W. SNYDER.

Kansas City, Mo.

[18] 105 Mo. 309; Keane v. Klausman, 21 Mo. App. 488.

WITNESS—SANITY—QUESTION FOR JURY.

BOWDLE V. DETROIT ST. RY. CO.

Supreme Court of Michigan, December 22, 1894.

Where a witness is sworn without inquiry by the court as to his sanity, but there is evidence that he is demented, it is proper to charge that, if the jury believe from the evidence that the witness is without sufficient mental capacity to understand what is going on, they are not at liberty to consider his testimony. McGrath, C. J., dissenting.

GRANT, J.: 1. The principal question in this case arises upon the following instruction of the court to the jury: "I allowed this testimony to be introduced as to the mental condition of this woman for the purpose of showing you, or allowing you to judge, as to how long her husband might be deprived of her society, or of her labor as a wife, in the discharge of her domestic duties in the household, and for no other purpose. You are at liberty to investigate all the proof in this case that has been offered to you as to whether this woman is sane or insane. I charge you that if you shall find that now this woman is without sufficient mental capacity to understand what is going on, you are not at liberty then to consider her testimony in this case at all, for you are only at liberty to consider the testimony of a person who is *compos mentis*, or of sound mind; for a person who is without sound mind, capable of remembering or giving testimony in a case, is not to be allowed in a court of justice. One of the physicians here testified that she was insane now. If you shall come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy; but if you shall have arrived at the conclusion that she is sane now and capable of knowing what she is doing and saying, and of remembering what transpired at the time this accident occurred or this injury happened, then you are to consider her testimony, and you are at liberty to consider it in connection with the permanent character of this injury, and also in weighing the testimony of the expert witnesses who have been produced in this case, who there is some evidence to show testified on a previous occasion that this woman would be permanently insane." No question was raised as to the competency of this witness at the time she was sworn, nor at any time during the giving of her testimony. One of the grounds upon which recovery was sought by the declaration is that she had become "completely and permanently insane." If such preliminary question had been raised, it would then have been the duty of the court to examine her, and such testimony as was proper in regard to her condition, and determine whether she was competent to be sworn. Some authorities have said that the preliminary question in such cases is, "Is the witness capable when sworn of understanding the nature of an oath?" To this some authorities add that he must be able to understand the subject with respect to which he is required to testify. When this preliminary question is passed, and the court has determined that the witness is competent to testify, the entire controversy is then transferred to the jury. The court may not say to the jury that the witness is or is not entitled to credence. The jury may reject the testimony entirely or may attach whatever weight to it they choose. We are cited to no authority which holds that it is incorrect to instruct the jury that, if they shall determine from the evidence that a witness is so insane as not to comprehend or be able to understand what she is doing and saying, and to remember what has transpired in regard to the subject about which she is testifying, they should reject her testimony altogether. To hold otherwise, in my judgement, would be a clear usurpation of the province of the jury. It would, in effect, be saying to them, "The witness is entitled to some credence, and it is for you to say how much." The preliminary decision of the court means nothing of the kind. The court simply decides that the witness is competent to testify, upon testimony not introduced for the consideration of the jury, but of the court. Afterwards, as in this case, testimony is introduced as to her mental condition, and her own testimony and demeanor and appearance are before the jury, and the question of her competency must then be determined by them when the evidence is conflicting. It is entirely clear that one clause of the instruction, standing alone, would be error, viz.: "One of the physicians testified that she was insane now. If you should come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy." The language following, however, restricts the above, and clearly conveys the meaning of the learned circuit judge, viz., that if she was then capable of knowing what she was doing and saying, and remembering what transpired at the time of the accident, then the jury were to consider her testimony. In determining the question the jury were further very properly told that they must consider all the testimony in the case, and, if they found that she was capable of understanding, they should give her testimony due weight; if they found on the contrary, that she was not, then they should reject it. I think this states the true rule. In Reg. v. Hill, 5 Eng. Law & Eq. 547, speaking upon this precise question, the court said: "If his evidence had, in the course of the trial, been so tainted with insanity as to be unworthy of credit, it was the proper function of the jury to disregard it and not to act upon it." This is quoted in Coleman's Case, 25 Grat. 876,

and is recognized as the sound and reasonable rule. This is the rule to be deduced from the language of the court in Reg. v. Hill, 5 Cox, Cr. Cas. 259. In that case Lord Campbell, C. J., says: "The lunatic may be examined himself that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." To the same effect are City of Gainesville v. Caldwell (Ga.), 7 S. E. Rep. 99, and Worthington v. Mencer (Ala.), 11 South. Rep. 72. The case of Mead v. Harris (Mich.), 60 N. W. Rep. 284, is not in conflict with this rule. In that case the preliminary question was raised before the witness was sworn and the court said that the would instruct the jury that, if they found that the witness was mentally incompetent, they should consider her testimony of no value; and the decision went no further than to hold that it was the duty of the court to determine, in the first instance, whether the witness was competent to testify, before the question could be submitted to the jury. I do not wish to be understood as holding that it is competent to introduce testimony of insanity to impeach the credibility of a witness. That question is not involved. I find no error in this instruction of the court.

NOTE.—*Insane Persons as Witnesses.*—A deaf and dumb person, capable of relating facts correctly by signs, may give evidence by signs through the medium of an interpreter, though it appears that such person can read and write, and communicate ideas, imperfectly by writing. State v. De Wolf, 8 Conn. 93. The question whether a person, who is offered as a witness, is insane at the time, goes to the competency of the witness, and is a preliminary question to be decided by the court. Holcomb v. Holcomb, 28 Conn. 177. The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony and not to his competency, and is, therefore, a subject for evidence to the jury, to be adduced by the opposing party with his other evidence. Holcomb v. Holcomb, 28 Conn. 177. And the fact of his insanity at the time of the transaction is to be proved in the same manner as insanity, in any other case, and evidence of his insanity, before and after the time of the transaction, is admissible for the purpose. Holcomb v. Holcomb, 28 Conn. 177. A deaf and dumb person, who can be communicated with by signs, is a competent witness, in Indiana, if he has sufficient discretion, and understands that perjury is punishable by law, though he has no conception of the religious obligation of an oath. Snyder v. Nations, 5 Blackf. (Ind.) 295. Idiots, lunatics and madmen are not competent witnesses. Livingston v. Kiersted, 10 Johns. (N. Y.) 362; Armstrong v. Timmons, 3 Harr. (Del.) 342. And proof of incompetency for such cause is admissible. Livingston v. Kiersted, 10 Johns. (N. Y.) 362; But see Evans v. Hettich, 7 Wheat. 453. To exclude a witness from testifying, as being *non compos*, or an idiot, the fact must be proved by other testimony, and not by a preliminary examination of the witness; and even if the court have any discretion, by which they may permit such preliminary examination, still it is not error for them to refuse to allow it. Robinson v. Dana, 16 Vt. 474.

The Supreme Court of Michigan held, in Mead v. Harris, 60 N. W. Rep. 284, that the question of the competency of a witness was one for the court and also that if a witness who is mentally weak can give lucid connected testimony, the question of the weight of such evidence is for the jury under proper instructions. The rule there laid down is sustained by an array of authorities. 1 Taylor on Evidence (8th Eng. Ed.), § 23; 2 Taylor on Evidence, § 1375; Coleman's Case, 25 Gratt. 865; District of Columbia v. Armes, 107 U. S. 519. The subject is ably discussed in the case last cited by Mr. Justice Field, who cites an English case (Reg v. Hill, 5 Cox, Cr. Cas. 259), where a patient in a lunatic asylum was held a competent witness. Mr. Wharton says: "It is now settled that in all cases either an idiot or lunatic may be received if, in the discretion of the court, it appears to have sufficient understanding to apprehend the obligations of an oath and to be able to give a correct answer to the questions put. The competency is to be determined by the judge trying the case, upon the examination of the witness himself or upon the testimony of third persons." 1 Whart. & S. Med. Jur. 212. Mr. McGrath, J., who dissents from the majority of the court, in the principal case, and holds that the court's instruction was error, grounds his conclusion upon the authority of the above cases. He states the rule to be that the person affected with insanity is admissible as a witness if he have sufficient understanding to comprehend the obligation of an oath and be capable of giving a lucid account of such matters as are in dispute, and that this question is to be determined, in the main, upon an examination of the witness when produced. The following are the very latest cases upon this subject:

A witness having been examined on interrogatories by commission is, *prima facie*, mentally competent to testify; and evidence afterwards taken, tending to show that he was insane when examined, is for consideration of the jury, and not for the court; there being also testimony in favor of sanity. City of Gainesville v. Caldwell (Ga.), 7 S. E. Rep. 99. Although one alleging that he is of unsound mind, and suing by his next friend, under Code, Sec. 2580, admits his mental incapacity, yet it is a question for the court to determine whether or not he is competent to testify. Worthington v. Mencer (Ala.), 11 South. Rep. 72. Under Code Crim. art. 730, subds. 1, 2, providing that persons who are insane when they are offered as witnesses, or who were insane when the events happened of which they are called to testify, are incompetent as witnesses, an insane woman cannot testify as to rape alleged to have been committed on her. Lopez v. State (Tex. App.), 17 S. W. Rep. 1058. A witness should not be excluded on the ground of mental incapacity, if he has sufficient capacity to understand an oath, and to narrate the transaction in what appears to be an intelligent, rational manner, but the question as to his credibility should be left to the jury. Walker v. State (Ala.), 12 South. Rep. 83. Under Code Civil Proc. Sec. 1880, declaring that persons "who are of unsound mind at the time of their production for examination" cannot be witnesses, the fact that a person has been committed to an asylum as insane does not render her an incompetent witness, but the question of competency is for the court, and her testimony is properly received, in the absence of anything to show her of unsound mind. Clements v. McGinn (Cal.), 33 Pac. Rep. 920.

JETSAM AND FLOTSAM.

TWICE IN JEOPARDY.

If the newspaper accounts are correct, the Supreme Court of Connecticut has recently rendered a decision which will attract much attention. It is reported that in a criminal case (State v. Lee) the State has secured a new trial on appeal for error of law. In the court below the prisoner was acquitted of having caused the death of a patient by a criminal operation. By the decision of the Supreme Court he is subjected to a second trial without his consent. There is no reason to believe this decision unsound. The fifth amendment of the United States Constitution, providing that no person be "subject for the same offense to be twice put in jeopardy of life or limb" is now admitted to be a restriction on the federal government alone (108 Mass. 5; 7 Peters, 243; 20 How. 84). The constitution of Connecticut contains nothing on the subject, so that a statute providing for a second jeopardy would be constitutional (Green Bag, vi. 373). Connecticut has a statute allowing the State an appeal for error of law in criminal cases (Gen. Stat. Conn. § 1637, being Conn. Stat. 1886, ch. 15). Several other States have similar statutes, but they are not construed to give the prosecution a new trial after acquittal. (Cf. McClain's Iowa Code, §§ 5921, 5924; Bish. New Crim. Law, 8th Ed., I. § 1024.) That is, however, because of restrictions in the State constitution as to second prosecutions. In Maryland, where no such restriction is contained in the constitution, the State has been allowed to secure on writ of error a reversal of a judgment given in favor of the defendant; and this, apparently, in the absence of statute (State v. Buchanan, 5 Har. & J. 317). In Connecticut there is no constitutional difficulty in the way, and there does not seem to be any very good reason why the plain words of the statute should not be given the meaning attached to them in State v. Lee. As a matter of justice, it is difficult to see why the State should not have a new trial if there has been error in the proceedings. Why the rule forbidding a second jeopardy should apply here, and not where the trial has been on a defective indictment, is not very plain as a question of abstract justice. That the law is as stated is probably not to be explained by the circumstance that new trials came into use after the rule as to a second jeopardy had become settled. The law would probably have been the same even had new trials been of ancient origin. For, until within a comparatively recent time, carrying a criminal case up has generally been regarded as simply a further means of defense. That was the Continental view also, to the establishment of which Carpzow contributed more, perhaps, than any once else. If such a view ever was justified on political grounds or grounds of expediency, it hardly seems to be now. Has not the time come to put the State on the same footing as the prisoner with regard to all means of modifying or reversing a judgment and obtaining a new trial? That is the law generally on the Continent under the codes. Such a change might be made by statute in several of our States, where there is no jeopardy clause in the constitution (Maryland, Massachusetts, Vermont, and Virginia, and perhaps others. Colorado already has a sufficient provision in her constitution).

Although the decision in the principal case is to be supported by reason of the Connecticut statute, the court seems in one place to use language very general in application. It is suggested that the first jeopardy is not exhausted until all the means have been used to secure a new trial. That is not the settled practice, and such a view would not be likely to meet with general acceptance.—*Harvard Law Review.*

JUDGES WHO STEAL THE THUNDER OF COUNSEL.

The observations of the *New York Law Journal* in palliation of the conduct of the judges who, in writing their opinions, steal the thunder furnished by the successful counsel in their briefs, are worthy of note. The custom is not necessarily a bad one, provided due credit is given. It is a compliment to the lawyer whose argument is appropriated by the judge, even where credit is not given; but the judge could greatly enhance the compliment by yielding honor to whom honor is due. The literary plagiarist who steals and condenses the copyrighted writings of other authors, reduces them to a small compass, and gets them under his own name under the pretense of their being original productions, and by that means not only steals the goods of the original writer but uses them to destroy his market—stands on a totally different footing.—*American Law Review.*

HUMORS OF THE LAW.

A certain justice of the peace having arrived, previous to a trial, at a conclusion upon a question of law highly satisfactory to himself, refused to entertain an argument by the opposing counsel. "If your honor pleases," the counsel replied, "I should like to cite a few authorities upon the point." Here he was sharply interrupted by the justice, who stated: "The court knows the law, and is thoroughly advised in the premises, and has given its opinion, and that settles it." "It was not," continued the counsel, "with an idea of convincing your honor that you are wrong, but I should like to show you what a fool Blackstone was."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—In an accident on a policy of accident insurance, where the company set up a contract to accept a weekly payment for a certain number of weeks in discharge of the claim, parol evidence is admissible to show that plaintiff could not read or write, and placed his mark on the proofs of loss without knowledge that they contained such contract, and that he afterwards refused to sign a receipt in full when the sum of such weekly payments was paid to him. — LORD v. AMERICAN MUT. ACC. ASS'N, Wis., 61 N. W. Rep. 298.

2. ADMINISTRATION—Rights of Executor of Foreign Will.—Code 1873, ch. 2, tit. 16, § 2347, under the head, "Executors—Trustees," provides that if a person appointed executor refuses to appear within 10 days after appointment, and give bond, or if an executor removes from the State, a vacancy occurs. Section 2352, under the head, "Foreign Wills," provides that the law relating to domestic wills after probate shall, "so far as applicable," apply to foreign wills admitted to probate: Held that, where a foreign will has been admitted to probate in Iowa, a failure of the executor of such will to qualify as ancillary administrator within 10 days after his appointment as such does not create a vacancy.—IN RE MILLERS' ESTATE, Iowa, 61 N. W. Rep. 229.

3. APPEAL— Record.—An official declaration by a trial judge as to the admissions of counsel on the trial must, on appeal, prevail over the statements of counsel as to his admissions.—MARYLAND ICE CO. v. ARCTIC ICE MACHINE MANUF'G CO., Md., 30 Atl. Rep. 633.

4. APPEAL—Waiver.—An assignment of error, if not argued, is waived.—YOUNG v. OMAHA & ST. L. RY. CO., Iowa, 61 N. W. Rep. 209.

5. ASSUMPSIT—Pleading.—In an action of *assumpsit* to recover damages for defective machinery which plaintiff had purchased, paid for, and returned as useless, the plaintiff must charge the promise that the machinery would perform the work for which it was intended, positively, and not by way of recital.—WOLF v. SPENCE, W. Va., 20 S. E. Rep. 610.

6. ATTACHMENT—Issue before Maturity of Claim.—A creditor suing on a demand note had an attachment issued and levied on the same day he received the note. By mistake, the note and attachment papers were postdated as of the day after the attachment: Held, that such error would not invalidate the attachment proceedings as against subsequently attaching creditors.—SHAKMAN v. SOMMERMEYER, Wis., 61 N. W. Rep. 309.

7. ATTACHMENT — Judgment.—A judgment reciting that plaintiff have and recover against the defendant a specific sum named therein, and that the property attached (describing it) be sold to satisfy the judgment and costs, and awarding a special execution for the sale thereof, is not a personal judgment, but a judgment against the land.—GRIFFITH v. MILWAUKEE HARVESTER CO., Iowa, 61 N. W. Rep. 243.

8. ATTORNEY AND CLIENT—Action.— An agreement to pay an attorney for his services an amount equal to that paid another attorney connected with the same action is valid. — LUNGERHAUSEN v. CRITTENDEN, Mich., 61 N. W. Rep. 270.

9. CARRIERS — Passengers. — Defendant allowed a drunken man in its car with a sack containing a jug of alcohol and some matches. The jug broke, and its contents were thrown over the floor of the car, and the alcohol ignited, and plaintiff was burned: Held, that in protecting plaintiff from such an injury defendant was required to exercise such a high degree of foresight and prudence as would be used by very cautious, prudent, and competent persons under similar circumstances.—GULF, ETC. RY. CO. v. SHIELDS, Tex., 28 S. W. Rep. 709.

10. CARRIERS OF PASSENGERS—Sleeping Cars—Contract for Berth.—It is no excuse for a sleeping car company's breach of contract to reserve a certain berth for plaintiff that another person demanded it before plaintiff presented herself to pay for and occupy it, and that there was no other unoccupied.—PULLMAN PALACE-CAR CO. v. BOOTH, Tex., 28 S. W. Rep. 719.

11. CHATTEL MORTGAGE—Presumptive Fraud.—Where Rev. St. § 2313, declaring that no mortgage of personal property shall be valid, as against third persons, unless the property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof, be filed, is not complied with, the law conclusively presumes the mortgage to be fraudulent as to creditors, and no evidence of good faith, however clear, will render it valid.—RYAN DRUG STORE CO. v. HVAMBSAHL, Wis., 61 N. W. Rep. 299.

12. CHATTEL MORTGAGE—Sufficiency of Description.—A chattel mortgage described the property as 19 pure-blood Hereford cattle, and gave their names, adding, "The above names are the names as recorded in the American Hereford Herd Book." The American Hereford Herd Book was published in Missouri, and, when a breeder wished to register cattle, he sent the name of each animal there, and when there was enough names to make a volume, they were placed in alphabetical order, and a number given to each. An animal might not be numbered until a year after its name was sent in. The numbers were never duplicated, but the names often were: Held that, as to a subsequent mortgagee, the description was too indefinite.—TAYLOR v. GILBERT, Iowa, 61 N. W. Rep. 203.

13. CONSTITUTIONAL LAW — License Tax—Validity.—Act 1894, ch. 113, requiring traders in the city of Baltimore to take out separate licenses to carry on business in disconnected buildings, does not violate the bill of rights (article 15), providing that every person ought to contribute his proportion of taxes according to his actual worth in property, as a license tax is not a property tax, but a tax "for the good government and benefit of the community."—ROHR v. GRAY, Md., 30 Atl. Rep. 632.

14. CONSTITUTIONAL LAW—Municipal Indebtedness.—A city which was authorized by its charter, prior to the adoption of the constitution, to contract an indebtedness for public improvements, may contract pursuant to such previous authority after the adoption of the constitution, or at least until the legislature shall provide by general law for its government, though the indebtedness contracted exceeds the constitutional limit.—EX PARTE CITY OF LEXINGTON, Ky., 28 S. W. Rep. 665.

15. CONTRACT—Delay — Damages.—Damages in the nature of lost profits cannot be recovered for delay in furnishing material for a smelter, where it is not shown with certainty that the smelter could have been operated at a profit.—FRASER v. ECHO MINING & SMELTING CO., Tex., 28 S. W. Rep. 714.

16. CONTRACT FOR CUTTING TIMBER.—Where a lumbering contract provides that payment for cutting the timber is to be made according to the tally of a certain sawmill, where the logs were to be sawed, dead cull being excluded, the fact that the grading of the mill was higher than was customary among other mills is immaterial.—BRIGHAM v. MARTIN, Mich., 61 N. W. Rep. 276.

17. CONTRACT FOR PERSONAL SERVICES.—Contract for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable by his incapacity from illness to perform.—POWELL v. NEWELL, Minn., 61 N. W. Rep. 885.

18. CONTRACT—Marriage as Consideration.—Marriage in an antenuptial contract is a valuable consideration and such contract cannot be impeached by existing creditors as fraudulent unless it be shown that both parties thereto participated therein, or had notice of

fraudulent intent.—BOGGESS v. RICHARDS' ADMR., W. Va., 20 S. E. Rep. 599.

19. CORPORATION—Foreign—Lost Stock Certificate.—An action may be maintained in the courts of this State by a stockholder against a foreign corporation to compel it to issue to him a new or duplicate stock certificate in place of one which has been lost or destroyed.—GUILFORD v. WESTERN UNION TEL. CO., Minn., 61 N. W. Rep. 324.

20. CORPORATIONS — Service on Managing Agent.—Where a domestic corporation has only one agent residing in this State, he will be presumed to be its "managing agent," within Rev. St. § 2637, subd. 10, providing that in an action against a domestic corporation the summons may be served on its managing agent.—WICKHAM v. SOUTH SHORE LUMBER CO., Wis., 61 N. W. Rep. 287.

21. COUNTY—Defective Bridge—Notice of Defects.—In an action against a county for injuries caused by a defect in a county bridge, evidence that a member of the board of county supervisors was informed of the defect prior to a regular meeting of the board held before the time of the accident is competent, as it is the duty of each member of the board to report defects in bridges.—MORGAN v. FREMONT COUNTY, Iowa, 61 N. W. Rep. 231.

22. COVENANT OF WARRANTY — Damages.—Where a grantee is in possession at the time of receiving a conveyance, and thereafter voluntarily acquires the paramount title, the damages for breach of covenant of warranty in the conveyance is the amount necessarily paid for the outstanding title, with any other necessary expenses in procuring it.—DILLAHUNTY v. LITTLE ROCK & FT. S. RY. CO., Ark., 28 S. W. Rep. 657.

23. CRIMINAL EVIDENCE—Homicide—Confessions.—In the trial of a criminal case, when the State calls a witness for the purpose of proving a confession made by the prisoner, before the witness is allowed to detail such information it is the privilege of defendant's counsel to cross-examine the witness as to the circumstances under which the confession proposed to be detailed was made.—WILLIS v. STATE, Neb., 61 N. W. Rep. 254.

24. CRIMINAL LAW—Arguments of Counsel.—Where the evidence against a defendant on trial for assault is positive, a remark of the county attorney that, if the jury make a mistake, defendant can appeal, called forth by a line of argument opened by defendant's attorney, is not ground for reversal.—MOORE v. STATE, Tex., 28 S. W. Rep. 686.

25. CRIMINAL LAW—Assistant Counsel by State.—It was not error in a murder case to allow an attorney employed by deceased's brother (who, with deceased, jointly attacked defendant, and thus brought on the murder) to assist in the prosecution, and to make the closing argument to the jury, although the court had employed another attorney to aid in prosecuting the case.—STATE v. HELM, Iowa, 61 N. W. Rep. 246.

26. CRIMINAL LAW — Homicide — Self-defense. — The fact that a person arms himself before going to ask an explanation of insulting language spoken of him, and, on such language being repeated without any provocation on his part, replies in terms equally insulting, does not deprive him of the right to take his adversary's life in self defense.—SHANNON v. STATE, Tex., 28 S. W. Rep. 687.

27. CRIMINAL LAW—Larceny.—One who procures the agent of a railroad company to send him property of another, left on the company's right of way, is guilty of larceny thereof.—SIKES v. STATE, Tex., 28 S. W. Rep. 688.

28. CRIMINAL LAW—Secret Assault.—One who stands facing another, or walks up in front of him, and, drawing a pistol from his hip pocket, shoots him without warning, does not commit the offense defined by Acts 1887, ch. 32, § 1, which provides that any person who shall maliciously commit an assault and battery with any deadly weapon upon another, by waylaying or otherwise, in a secret manner, with intent to kill such other person, shall be guilty of a felony.—STATE v. PATTON, N. Car., 20 S. E. Rep. 538.

29. CRIMINAL PRACTICE—Assault in Secret Manner.—Laws 1887, ch. 32, making "an assault committed in a secret manner, by waylaying or otherwise," an offense, includes, in addition to those accompanied by waylaying, every other assault committed in a secret manner.—STATE v. SHADE, N. Car., 20 S. E. Rep. 537.

30. CRIMINAL PRACTICE—Indictment.—The fact that an indictment is signed by the wrong person, as county attorney, is not ground for reversing a conviction.—STATE v. KOVOLASKY, Iowa, 61 N. W. Rep. 223.

31. CRIMINAL PRACTICE — Plea — Innuendo.—It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an *innuendo*.—STATE v. ALER, W. Va., 20 S. E. Rep. 585.

32. DEED BY MINOR—Disaffirmance.—An infant, during his minority, can neither disaffirm a conveyance by him of land, merely because of his infancy, nor recover possession of the land.—SHIPLEY v. BUNN, Mo., 28 S. W. Rep. 754.

33. DEEDS — Acknowledgment.—Certificates of acknowledgment to deeds, made in July, 1839, in foreign States, are not insufficient because they do not state that the deeds were executed according to the laws of such States, since the registry law then in force only required certificates to state that "the officer taking the acknowledgment is such officer as by his certificate of acknowledgment he purports to be, and that he is duly commissioned and qualified."—MCCAMMON v. DETROIT, L. & N. R. CO., Mich., 61 N. W. Rep. 273.

34. DEED—Delivery.—Acknowledgment of a deed is not conclusive evidence of its delivery, but a circumstance tending to show delivery.—FERGUSON v. BOND, W. Va., 20 S. E. Rep. 591.

35. DEED—Rescission.—Where plaintiff conveys the land on which he is living, with his daughter-in law and her husband, to his daughter-in law in consideration of support for life, and leaves the premises without fault on her part, the conveyance will not be set aside, the grantee being ready to perform.—SCOTT v. SCOTT, Wis., 61 N. W. Rep. 286.

36. DEEDS—Support of Grantor as Consideration.—Where, in a deed of settlement from father to son, a tract of land is conveyed on the consideration that the son will support for life his father and his wife, the grantors, and the deed, taken as a whole, shows the intention to be to charge the real estate conveyed as security for the performance of such duty, it is not necessary that a lien on the land for such support be expressly reserved on the face of the conveyance.—MCCLURE v. COOK, W. Va., 20 S. E. Rep. 612.

37. DEED—Trust in Favor of Wife.—Where a wife's father, with her consent, for the purpose of making an equal distribution of his property among his children, causes land to be conveyed to her husband by a deed of general warranty, the land is not charged with any trust in favor of the wife.—ACKER v. PRIEST, Iowa, 61 N. W. Rep. 235.

38. DIVORCE—Allotment of Homestead.—In making an adjustment or division of the property of the husband between the parties in an action for divorce, the court may set off to the wife a whole or a part of the homestead, or may, in lieu thereof, allow her alimony, and make it a specific lien on the homestead. The provisions of the constitution and statutes relating to "homestead exemptions" have no application to such a case.—MAHONEY v. MAHONEY, Minn., 61 N. W. Rep. 334.

39. EJECTMENT — Counterclaim. — In ejectment the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee, where the statute only allows such claims when such expenditures are made

while "holding adversely" by color of title asserted in good faith, and founded on descent, or any written instrument. Rev. St. § 3096.—FLACK v. MARSH, Wis., 61 N. W. Rep. 287.

40. ELECTIONS AND VOTERS—Recanvass of Ballots—Mandamus.—*Mandamus* will not lie to compel the canvassing board to recanvass the ballots on account of error in the first canvass, since the party aggrieved by the former canvass has a full remedy by contesting the election.—HOUSTON v. STEELE, Ky., 28 S. W. Rep. 662.

41. EMINENT DOMAIN — Condemnation of Land. — Where, in a proceeding to condemn land for school purposes, plaintiff town's corporate existence as a school district is in issue, plaintiff must show that a plat of the town, together with the territory attached thereto for school purposes, has been filed with the county recorder, as required by Wagner's St. 1872, ch. 123, art. 2, § 1, as a prerequisite to the formation of such town into an incorporated single school district. —ORRICK SCHOOL DIST. v. DORTON, Mo., 28 S. W. Rep. 765.

42. EQUITY—Order by Board of Education.—A court of equity has jurisdiction of a suit by and on behalf of the resident taxpayers of a school district brought to set aside and hold for naught a contract made by the board of education so far as the same creates and incurs a debt to be paid out of the school money of subsequent years.—SHINN v. BOARD OF EDUCATION, W. Va., 20 S. E. Rep. 604.

43. ESTOPPEL IN PAIS.—A contract for the sale and construction of a creamery was signed by the purchasers at the solicitation of the seller's agent. The purchasers failing to provide land on which to construct the creamery, the seller, as permitted by the contract, procured land and erected the creamery in compliance with such contract, in the view of such purchasers. Soon after the contract was executed, and at various times afterwards, the latter sought to be released from, and refused to comply with, the contract for various reasons, which did not include any claimed alteration of it: Held, that the purchasers could not, in an equitable action by the seller to enforce such contract, set up an unauthorized alteration, of which the seller was ignorant made by the agent after part of them signed it.—DAVIS & RANKIN BLDG. & MANUF'G CO. v. DIX, U. S. C. C. (Mo.), 64 Fed. Rep. 407.

44. EXECUTION—Issuance in Vacation.—Execution on a judgment for the possession of land may be issued in vacation as a matter of course if the time limited for the stay of execution has expired.—CHRISTLER v. LOCKE, Mich., 61 N. W. Rep. 263.

45. EXECUTION FOR FINE—On What Levied.—A writ of *fieri facias* upon a judgment of a Circuit Court for a fine against a person convicted of a misdemeanor ought to run against goods and chattels and real estate.—GILL v. STATE, W. Va., 20 S. E. Rep. 568.

46. FEDERAL COURTS — Jurisdiction—Conclusive Organization of Corporation.—The organization by the individual stockholders and officers of a corporation existing under the laws of one State of a corporation under the laws of another State for the express purpose of bringing a suit in a Federal Court to try the title to a tract of land claimed by the former corporation, and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court.—LEHIGH MIN. & MANUF'G CO. v. KELLY, U. S. C. C. (Va.), 64 Fed. Rep. 401.

47. FRAUDS, STATUTE OF.—Where plaintiff held an unrecorded bill of sale of a part of their debtor's property as security for his notes, and in consideration of their surrendering it to defendant, and of the transfer to defendant by the debtor of all his property, defendant promised to pay said notes, the promise was not to pay the debt of a third person, within the statute of frauds.—GREEN v. HADFIELD, Wis., 61 N. W. Rep. 810.

48. FRAUDULENT CONVEYANCES—Conflict of Laws.—The sales of personal property, when situated at the place of the domicile of the vendor, are governed by the law *rei sitæ*, and not by the laws of the State to which they may thereafter be removed.—KURNER v. O'NEIL, W. Va., 20 S. E. Rep. 589.

49. FRAUDULENT CONVEYANCES — Consideration.—A sale of personalty by a debtor in failing circumstances is invalid as against his creditors, unless the goods are sold for a valuable consideration and delivered with such convenient promptness as the transaction warrants, and the purchase is made with no purpose of defeating the claims of the creditors.—MILLER v. LACEY, Del., 30 Atl. Rep. 640.

50. FRAUDULENT CONVEYANCES—Future Creditors.—A conveyance made with intent to defraud future creditors is void as to them. Where a conveyance is made with no intention of passing title, but with the understanding that the grantee will hold in trust for the grantor, creditors, whether prior or subsequent, may subject the property to the payment of their debts.—RIVES v. STEPHENS, Tex., 28 S. W. Rep. 707.

51. FRAUDULENT CONVEYANCES—Husband to Wife.—Where one about to become a member of a business partnership conveys all his property, worth several thousand dollars, to his wife, in payment of a loan of $400, the conveyance is void as against subsequent creditors of the firm. — SOMMERMEYER v. SOMMERMEYER, Wis., 61 N. W. Rep. 311.

52. FRAUDULENT CONVEYANCES—Preferences.—Under section 2 of chapter 74 of the Code of 1891, an insolvent debtor cannot prefer his creditor or creditors by a deed of trust formally executed upon his real estate subsequent to the passage of said act, but the same shall be taken and held to be made for the benefit of all the creditors of such debtor.—ARGAND REFINING CO. v. QUINN, W. Va., 20 S. E. Rep. 576.

53. GARNISHMENT — Debts Subject to. — Where, in garnishment, the evidence shows that the garnishees owe defendant directly, or as heir of his deceased wife, plaintiff is entitled to judgment.—SIMMINS v. CARMICHAEL, Tex., 28 S. W. Rep. 690.

54. HAWKERS AND PEDDLERS—Statute.—A person who solicits orders, by sample, for sewing machines and their parts and attachments, for a foreign sewing machine company which has a store and stock of goods in the State, from which such orders are filled is not a "hawker or peddler," within the meaning of such act, though he occasionally sells a sample machine out of his wagon.—STATE v. MOREHEAD, S. Car., 20 S. E. Rep. 544.

55. IMMIGRATION — Admission of Aliens.—The provision in the sundry civil appropriation act of August 18, 1894, making the decision of an immigration or customs officer excluding an alien from admission to the United States final unless reversed on appeal to the secretary of the treasury, does not give that officer final jurisdiction to determine that a person of Chinese descent is not a citizen of the United States, where he claims the right to admission on the ground that he is a citizen; and the question of his citizenship may be determined by the courts on writ of *habeas corpus*.—IN RE TOM YUM, U. S. D. C. (Cal.), 64 Fed. Rep. 485.

56. INSURANCE—Contract of Renewal.—An oral agreement between plaintiff and defendant's agent in regard to renewing a policy of fire insurance, in which the amount of the policy to be taken is not fixed, does not constitute a binding contract.—SATER v. HENRY COUNTY FARMERS' MUT. FIRE INS. CO., Iowa, 61 N. W. Rep. 209.

57. INSURANCE—Insurable Interest.—Where the consignee of goods to be paid for if sold, and, if not, to be returned to the consignor, applies for insurance thereon in his own name, intending to insure for the full value of the property, and the insurance agent writes the policy with that end in view, knowing the nature of the applicant's title, a clause in the policy limiting the liability to an amount not exceeding the interest of the applicant does not restrict the liability, in case of loss, to his personal interest, so as to pre-

vent a recovery for their full value.—FOX v. CAPITAL INS. CO. OF DES MOINES, Iowa, 61 N. W. Rep. 211.

58. INTOXICATING LIQUORS—License.—Under Acts 25th Gen. Assem. ch. 63, providing that the business of selling intoxicating liquors shall not be conducted within 300 feet of any church or school building, the distance must be measured on a direct line, and not by the traveled route.—STATE v. GREENWAY, Iowa, 61 N. W. Rep. 239.

59. JUDGMENT—Collateral Attack.—The validity of a judgment of a court of competent jurisdiction will not be considered on a motion to quash a writ of *fieri facias* issued thereunder.— JONES v. GEORGE, Md., 30 Atl. Rep. 635.

60. JUDGMENT— Payment by Surety.—A surety unconditionally paying a judgment against himself and a cosurety, without taking an assignment thereof, cannot compel contribution from his cosurety.—MCGINNIS v. LORING, Mo., 28 S. W. Rep. 750.

61. JUDGMENT—Scire Facias to Revive.—An assignee of a judgment cannot, in his own name, maintain a writ of *scire facias* to revive it.—WELLS v. GRAHAM, W. Va., 20 S. E. Rep. 576.

62. LANDLORD AND TENANT—Lease on Shares — Assignment.—A lease of land on shares is not assignable by the lessee without the consent of the lessor.—LEWIS v. SHELDON, Mich., 61 N. W. Rep. 269.

63. LIMITATIONS—Absconding Debtor.— Where resident debtors absconded in order to prevent the limitations from running against a claim after the return of one of them, it is necessary that the creditor should have taken some active steps to have ascertained the debtor's whereabouts; and if he could, in the exercise of reasonable diligence, have served process on him, the statute commenced to run on his return, and never stopped afterwards.—DUKES v. COLLINS, Dela., 30 Atl. Rep. 639.

64. MANDAMUS TO CITY — Enforcement of Claim. — Where the common council of a municipal corporation has given its creditor an order on its treasurer for the payment of his claim, and then refused to pay it or provide for its payment, *mandamus* is the creditor's proper remedy, and he is not required to first reduce his claim to judgment by one of the ordinary actions at law.—THOMAS v. TOWN OF MASON, W. Va., 20 S. E. Rep. 580.

65. MARRIAGE—Legitimacy of Children. — Rev. St. 1889, § 4475, providing that "the issues of all marriages decreed null in law, or dissolved by divorce, shall be legitimate," does not render adecree annulling a marriage necessary in order to legitimate the children, there being evidence which would justify the annulment of the marriage.—GREEN v. GREEN, Mo., 28 S. W. Rep. 752.

66. MARRIED WOMAN'S CONTRACT—Separate Estate.—Where a married woman executes a joint and several note with her husband for the payment of money, her separate estate may be subjected in equity to the payment of the debt, although her husband may own a small amount of land which is insufficient to pay the debt.- SKIDMORE v JETT, W. Va., 20 S. E. Rep 573.

67. MASTER AND SERVANT—Assumption of Risks.—The test as to the assumption of the risk by an employee who uses a dangerous machine is whether an ordinarily prudent person of his age and experience, under like circumstances, would have appreciated the danger.—CRAVEN v. SMITH, Wis., 61 N. W. Rep. 317.

68. MASTER AND SERVANT—Fellow-servants.—Where a road master of a railroad company, whose duty is to impart orders to the foremen under him, intrusts the delivery of an order to a locomotive fireman, who, by his negligence, injures the foreman, the road master becomes a vice-principal *ad hac vice*, and the defend ant railway company is liable.—CARD v. EDDY, Mo., 28 S. W. Rep. 753.

69. MASTER AND SERVANT—Instructions to Employee. —A railroad company is not required to instruct one entering its service as brakeman how to mount moving cars, when such employee has long experience in so doing, and knows the dangers attendant thereon.—YEAGER v. BURLINGTON, C. R. & N. RY. CO., Iowa, 61 N. W. Rep. 215.

70. MECHANIC'S LIEN — Validity.—A mechanic's lien for a balance due on material furnished in the construction of several distinct buildings, upon as many different lots, owned by different persons, cannot be established on all of the properties, on the ground that one of the owners acted as the agent of all of them in contracting therefor.—BARTLETT v. BILGER, Iowa, 61 N. W. Rep. 233.

71. MECHANIC'S LIEN—Verification of Account.—Under Rev. St. 1889, § 6709, requiring a contractor, in perfecting a mechanic's lien, to file an account verified by the oath of "himself or some credible person for him," the affidavit, when made by another than the contractor, need not recite that the affiant is the agent of the contractor.—MCLAUGHLIN v. SCHULTZ, Mo., 28 S. W. Rep. 755.

72. MORTGAGE FORECLOSURE—Pendency of Partition. —Where a mortgagor sells an undivided part of the land to different persons, the pendency of partition by one of the purchasers against the other purchaser and the mortgagees, in which the latter made default, is not a bar, under Rev. St. § 3103, to an action by such mortgagees to foreclose the mortgage. — GIBSON v. SOUTHWESTERN LAND CO., Wis., 61 N. W. Rep. 282.

73. MUNICIPAL BONDS—Validity—Fraud.—If, in municipal bonds, the recitals of facts, taken collectively, are such as naturally and reasonably would inspire the confidence and belief of purchasers in the existence of the conditions which would make their issue lawful, and that was the intended and expected consequence of incorporating those recitals in the bonds, a *bona fide* purchaser would not be chargeable with notice, and defeated in his right of recovery as such, by the fact that an ordinance, recited in the bonds by its date only, misappropriated the bonds to an unlawful use.—RISLEY v. VILLAGE OF HOWELL, U. S. C. C. of App., 64 Fed. Rep. 453.

74. MUNICIPAL CORPORATION — Defective Sidewalk— Snow.—An accumulation of snow and ice on a sidewalk caused by travel over the snow, may constitute a defect rendering the city liable to travelers falling thereon.—WEST v. CITY OF EAU CLAIRE, Wis., 61 N. W. Rep. 313.

75. MUNICIPAL CORPORATION—Employment as Architect.—A resolution passed by a board of public works, which had supervision of the superintendent of buildings to the effect that "C, sup-rintendent of buildings, shall be architect of the city hall, and shall have supervision of the construction thereof," does not constitute a contract of employment of C as supervising architect, authorizing a recovery by him for his services as such in addition to his salary.—CHAMBERLAIN v. KANSAS CITY, Mo., 28 S. W. Rep. 745.

76. MUNICIPAL CORPORATION — Liability. — Where a city voluntarily undertakes to furnish water for irrigation to the public, and wrongfully withholds such water from a citizen, it is liable therefor only in tort. —CITY OF YSLETA v. BABBITT, Tex., 28 S. W. Rep. 702.

77. MUNICIPAL CORPORATION—Snow on Street.—A city is not liable for personal injuries caused by an obstruction in the street formed by snow thrown from the sidewalk together with that thrown from the street car tracks.—HUTCHINSON v. CITY OF YPSILANTI, Mich., 61 N. W. Rep. 279.

78. MUNICIPAL LAW—Constitutionality of City Ordinance.—A municipal ordinance prohibiting the carrying on of certain business pursuits within the city limits on Sunday, and prescribing penalties therefor, is not invalid because it excepts from its inhibition various business pursuits that are not excepted from the operation of the State law on the same subject. — THEISENV. MCDAVID, Fla., 16 South. Rep. 321.

79. MUTUAL BENEFIT INSURANCE—"Legal Representatives."—The words "legal representatives" in a life

insurance policy construed as meaning heirs or next of kin, and not executors or administrators.—SCHULTZ v. CITIZENS' MUT. LIFE INS. CO., Minn., 61 N. W. Rep. 831.

80. NEGLIGENCE—Highway—Law of the Road.—In an action for injuries to plaintiff's horse, caused by a collision with defendant on a highway, evidence that there was a beaten wagon way on each side of the road, and that defendant was driving to his left of the center of the road, warrants a finding that defendant was negligent.—LUEDTKE v. JEFFREY, Wis., 61 N. W. Rep. 292.

81. NEGLIGENCE—Injuries from Bite of Dog.—Unless the owner of a dog knows that it has a savage disposition, and is accustomed to bite, he is not liable for injuries due to its bite.—WARNER v. CHAMBERLAIN, Dela., 30 Atl. Rep. 638.

82. NEGLIGENCE—Liability of Husband.—Where recovery is sought against a husband and wife on the ground that plaintiff's injuries, caused by the discharge of a rifle in the hands of the wife, were due to the negligence of both husband and wife, no presumption that the husband is liable arises from their relationship and the fact that he was present.—BETHEL v. OTIS, Iowa, 61 N. W. Rep. 200.

83. NEGOTIABLE INSTRUMENT — Interest Coupon. — Coupons that are payable to bearer, and that are attached to and represent the semi annual installments of interest accruing upon railroad bonds, are, in legal effect, promissory notes, and possess all the attributes of negotiable paper. — TRUSTEES OF INTERNAL IMP. FUND v. LEWIS, Fla., 16 South. Rep. 325.

84. NEGOTIABLE NOTE—Protest.— A waiver, on the part of makers, indorsers, and guarantors, of presentation, protest and notice of non-payment, contained in the body of a note, is binding on the payee in case he indorses the note.—PHILIPS v. DIPPO, Iowa, 61 N. W. Rep. 216.

85. NUISANCE— Abatement — Pleading.—In a suit to enjoin a liquor nuisance, no reply is necessary to an answer which alleges that the suit is brought in bad faith, and for the purpose of annoying defendant, the purpose being immaterial.—MCQUADE v. COLLINS, Iowa, 61 N. W. Rep. 213.

86. PARTNERSHIP.—An agreement between two parties to farm on shares, one of whom is to expend a certain sum in the farming operations, does not constitute a partnership, though one of the parties spoke of it as such.—ROSE v. BUSHER, Md., 30 Atl. Rep. 637.

87. PARTNERSHIP—Accounting.—In an accounting between partners, in which plaintiff claims the business resulted in a profit, and it appears there was a loss instead, defendant cannot recover of plaintiff the latter's share of such loss, where he simply denies plaintiff's right to recover, and asks no affirmative relief.—HELMER v. YATZER, Iowa, 61 N. W. Rep. 206.

88. PARTNERSHIP — Death of Partner.—Where one partner advanced money for the purchase of materials for repairing the firm property, and in his will gave the other partners the privilege of buying his share in such property at a fixed price, manifestly considering the amount so advanced as a demand against the firm, the survivors, who were also executors of his estate, may repay the amount so advanced with assets of the firm.—ASHBROOK v. ASHBROOK, Ky., 28 S. W. Rep. 660.

89. PARTNERSHIP — Firm and Private Creditors.—A partner cannot use the firm's assets to pay a private debt without his copartner's consent.—DAUGHERTY v. HAYNES, Tex., 28 S. W. Rep. 692.

90. PARTNERSHIP — Marshaling Firm Assets.—A firm having agreed that one partner should furnish the bulk of the capital necessary in the business, such partner, without contributing money, gave to a third person a first mortgage bond on his individual property to secure credit for the firm. The mortgagee afterwards levied an attachment on the firm property: Held that, as between the attaching mortgagee and a subsequent unsecured attaching creditor of the firm, the security given by the individual member constituted his contribution to the capital, and was firm property, and that equity would require the mortgagee to exhaust it before sharing in the proceeds of a sale under his attachment.—C. GOTZIAN & CO. v. SHAKMAN, Wis., 61 N. W. Rep. 304.

91. PAYMENT BY NOTE.—In the absence of an agreement to that effect, a note given for interest due on a mortgage does not operate as a payment of such interest.—NASH v. MEGGETT, Wis., 61 N. W. Rep. 283.

92. PLEADING—Action against Partners.—At common law, partners cannot be sued otherwise than in their individual names, and the allegation of a partnership name is merely for the purpose of identification, and description is immaterial, and need not be proven, and hence the unnecessary use of it may be regarded as merely surplusage.—COURSON v. PARKER, W. Va., 20 S. E. Rep 583.

93. PLEDGE—Illegal Seizure.—A transfer made with the intent that the assignee should dispose of the property to satisfy his own claim, and then pay any surplus to the other creditors, gives sufficient title to support an action for wrongful seizure under attachment.—MERCHANTS' NAT. BANK v. BARKER, Tex., 28 S. W. Rep. 698.

94. PROHIBITION—Writ—When Granted.—Where, in a libel against a ship for injury to cargo, the time charterer is cited in by the owner of the vessel, claiming that the charterer was liable, as between the owner and charterer, for the negligence, if any, which caused the injury, the court, having jurisdiction of the subject-matter and the parties, will not be prohibited from entertaining the owner's contention against the charterer same suit with the libel against the ship, as the error, if any, in so doing, may be corrected on appeal.—IN RE NEW YORK & P. R. STEAMSHIP CO., U. S. S. C., 15 S. C. Rep. 182.

95. RAILROADS—Fencing Tracks.—The repairing of a railroad fence by nailing on loose boards, and putting on others in place of defective ones, using no new materials, does not constitute such "repairs" as are contemplated by Acts 1888, ch. 30, providing that, where fences already constructed are rebuilt or repaired, they must conform to the requirements therein made for new fences.—MOECKLEY v. CHICAGO & N. W. RY. CO., Iowa, 61 N. W. Rep. 227.

96. RAILROAD COMPANY — Accident at Crossing.—In an action for injuries at a crossing it is error to charge that it was plaintiff's duty, when approaching the crossing, to look and listen "at all points" in his passage, and that a failure to do so was contributory negligence.—WINEY v. CHICAGO, M. & ST. P. RY. CO., Iowa, 61 N. W. Rep. 218.

97. RAILROAD COMPANIES — Foreclosure Sale.—The mere fact that purchasers of a railroad under a judgment foreclosing all liens thereon and ordering it sold to pay debts knew that certain judgments had been decreed to be first liens on the property, does not render a company organized by such purchasers to operate the road liable for the amounts of the judgments.—HOUSTON, E. & W. T. RY. CO. v. KELLER, Tex., 28 S. W. Rep. 724.

98. RAILROAD COMPANY — Illegal Lease.—Where the officers, directors, and shareholders of a railroad company designedly enter into an illegal and void lease of their railroad to another company, the court will not relieve them therefrom, they being in *pari delicto*.—OLCOTT v. INTERNATIONAL & G. W. R. CO., Tex., 28 S. Rep. 728.

99. REAL ESTATE AGENT—Commissions.—Defendant, in a conversation with plaintiff, whom he knew to be a real estate broker, but whose services in selling the property in question he had previously declined, told plaintiff that he would take $30,000 for the property. Plaintiff asked him if he was in earnest, and defendant said that he meant business, and that, if plaintiff did not think so, let him bring a purchaser: Held, that the language did not constitute an offer to pay plaintiff

a commission for procuring a purchaser at the price stated.—DUNN v. PRICE, Tex., 28 S. W. Rep. 681.

100. REMOVAL OF CAUSES—Diverse Citizenship.—An administrator with the will annexed, a citizen of Connecticut, filed a bill in the State court for the construction of the will, against two beneficiaries, citizens, respectively, of Connecticut and New York—the former claiming that certain personal property, bequeathed to her for life, with power of sale and appropriation of proceeds, should be delivered to her as her own; and the latter claiming that such life beneficiary should give bonds under a statute of Connecticut, for the safekeeping of such property: Held, that the cause was not removable, the administrator being, under the law of Connecticut, not a nominal, but a real, party in interest, and one of the defendants being a citizen of the same State.—SECURITY CO. v. PRATT, U. S. C. C. (Conn.), 64 Fed. Rep. 405.

101. RES JUDICATA.—Where defendant appeals from a judgment allowing plaintiff to withdraw certain claims without prejudice, and the judgment is reversed to enable defendant to get a determination of such claims, he cannot, on a second trial, allege that such claims were *res judicata*.—MCARTHUR v. SCHULTZ, Iowa, 61 N. W. Rep. 217.

102. RES JUDICATA—Identity of Plaintiff.—In an action on a bond, on the issue as to whether a prior suit by one G was for the benefit of plaintiff, plaintiff testified that on account of his being a non-resident he assigned to G "the right to prosecute the bond, being the same claim for which this action is brought:" Held, that such prior action was binding on plaintiff.—GARRETSON v. FERRALL, Iowa, 61 N. W. Rep. 215.

103. SALE—Contract.—Where the purchaser of goods agrees to pay 64 cents on the dollar on the cost price, and the owner of the goods has not paid for them, "cost price" means the price such owner, at the time of the sale, would have to pay to the wholesaler; and, if the time for obtaining a discount on the billed price has passed, such purchaser is not entitled to have such discounts considered in computing the price to him.—MCCOY v. HASTINGS & BRADLEY CO., Iowa, 61 N. W. Rep. 205.

104. SALE—Implied Warranty.—In sales of personal property by one in possession, there is an implied warranty of good title.—JARRETT v. GOODNOW, W. Va., 20 S. E. Rep. 575.

105. SALE—Parol Evidence.—Where a contract of sale provides that title shall remain in the seller until the price, including notes given therefor, is paid, the fact that two of the notes were signed by only two of the buyers, and one by only the other one, does not render the contract ambiguous, so as to permit the admission of parol evidence to show that the contract was in fact several.—PETTYPLACE v. GROTON BRIDGE & MANUF'G CO., Mich., 61 N. W. Rep. 266.

106. STATUTES—Validity—Manner of Enactment.—An authenticated statute is the best evidence that the required formalities were observed in its passage, the court will not inquire into the manner of its enactment.—MCLANE v. PASCHAL, Tex., 28 S. W. Rep. 711.

107. TAXATION—School Taxes—Levy.—A tax levied for the erection of school buildings is a tax levied "for schools" and therefore may be levied without the order of the county court required by section 7654 in case of the levy of taxes for any purposes other than those enumerated in section 7653.—ST. LOUIS & S. F. RY. CO. v. GRACY, Mo., 28 S. W. Rep. 736.

108. TAXATION — Validity of Assessment. — The Indiana State board of tax commissioners, having jurisdiction to hear evidence and decide what property is assessable, determine its value for the purpose of taxation, and assess property within the limits of the State, made an assessment upon the property of a bridge company owning a bridge across a river between that State and an adjoining State: Held, that such assessment was not void because the board had, by mistake, erroneously included in such assessment a portion of the bridge actually within such adjoining State.— YOUNGSTOWN BRIDGE CO. v. KENTUCKY & I. BRIDGE CO., U. S. C. C. (Ind.), 64 Fed. Rep. 441.

109. TELEGRAPH COMPANIES — Failure to Transmit Message.—The receiver of a message, as well as the sender, is bound by a condition in the contract requiring claims for damages to be presented to the telegraph company within 60 days after the day the message is filed for transmission.—FINDLAY v. WESTERN UNION TEL. CO., U. S. C. C. (Va.), 64 Fed. Rep. 459.

110. TRESPASS ON LAND—Taking Possession.—A person taking possession of land as the *bona fide* purchaser at a sale under a judgment of foreclosure against the person holding the legal title is not a trespasser, although his title is subsequently adjudged void.—RABB v. PATTERSON, S. Car., 20 S. E. Rep. 540.

111. TRESPASS TO TRY TITLE—Lien for Improvements.—Money expended by the holder of the legal title to a head right certificate in locating the land and in paying taxes thereon is a lien on the equitable interest of others in the land.—HENSEL v. KEGANS, Tex., 28 S. W. Rep. 705.

112. TRIAL—Special Verdict.—A special verdict may be sufficient, although it fails to find specially facts which, though put in issue by the pleadings are uncontroverted on the trial, or established by undisputed evidence.—MURPHY v. WEIL, Wis., 61 N. W. Rep. 315.

113. TRUST DEED FOR CREDITORS.—Acceptance by a part only of the creditors secured by a preferential deed of trust is sufficient to validate the trust as to them.—MARTIN-BROWN CO. v. HENDERSON, Tex., 28 S. W. Rep. 695.

114. WATERS—Riparian Rights.—Accretion.—Where a lake 5 miles long and 100 rods wide is drained in one year by an artificial ditch and by cutting into it of a river, a riparian owner does not acquire title to the bed of the lake under the law of accretion.—NOYES v. COLLINS, Iowa, 61 N. W. Rep. 250.

115. WATERS — Riparian Rights — Accretion.—Where one owns land along a river, and part of it is washed away, and land again forms within his original land lines, the land so formed belongs to him, though a slough remains between the main land and the new formation.—MINTON v. STEELE, Mo., 28 S. W. Rep. 746.

116. WATERS—Tide Lands—Disposition by State.—A State, if its laws permit, may dispose of its tide lands free from any easement of the upland owner.—PACIFIC GAS IMP. CO. v. ELLERT, U. S. C. C. (Cal.), 64 Fed. Rep. 421.

117. WILL — Provision for Widow.—A condition attached to a devise in trust, that the devisee shall give bond to support testator's widow during life, followed by the filing of such bond by him, and his performance of the conditions thereof, is a provision for the widow which deprives her of dower, unless she commence proceedings for the assignment of the latter within the time provided by Rev. St. 1858, ch. 89, § 18.—TURNER v. OBERHEU, Wis., 61 N. W. Rep. 280.

118. WILLS—Estate Passed.—A clause in a will, reading, "I give and bequeath to my son and only child all the rest of my estate, to be placed in the hands of his trustees, and, should my son die leaving no issue, then the estate hereby bequeathed" to be limited over to certain other relatives of deceased, operating upon both realty and personalty, and until the son shall attain his majority, is a devise to his trustees of a particular estate in such realty and personalty until that time when he will become entitled thereto, with a remainder over to the others named only in case of his death without issue before then.—JONES v. MOORE, Ky., 28 S. W. Rep. 659.

119. WILL—Powers of Executors.—Held, taking the will involved in this case as a whole, that the executors thereof had full power and authority to sell and convey the premises in dispute for the purpose of paying claims against the estate, which was insolvent.—LOVEJOY v. MCDONALD, Minn., 61 N. W. Rep. 320.